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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter Of Ronald Brasher, Patricia Brasher, and DLB Enterprises, Inc. dba Metroplex Two-Way Radio Service	))))	EB Docket No. 00-156

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before: The Commission

REQUEST FOR SPECIAL PERMISSION
TO FILE COMBINED EXCEPTIONS EXCEEDING TWENTY FIVE PAGES

1. In accord with 47 C.F.R. § 1.276, Ron Brasher, Patricia Brasher ("the Brashers") and DLB Enterprises, Inc., dba Metroplex Two-Way Radio Service ("DLB") (collectively "the Parties") hereby submit combined exceptions to those findings published in the Initial Decision of Administrative Law Judge Arthur I. Steinberg, *In the Matter of Ron Brasher, et al.*, EB Docket No. 00-156 (Released August 8, 2003) ("Decision"), which Decision arose out of a hearing before Judge Steinberg pursuant to *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing*, EB Docket No. 00-156, 15 FCC Rcd 16,326 (Released August 29, 2000) ("HDO"), which hearing occurred between February 26 and March 9, 2001 and request special permission, in accord with 47 C.F.R. § 1.277(c), to exceed the codified page limit of 25 pages.

2. The Decision arises under a complex set of facts and circumstances which required that the Court write a voluminous Decision, which ran over 170 paragraphs, for the purpose of deciding six issues placed before it for determination. The transcript of testimony taken ran into the hundreds of pages, as did the documentary evidence entered at hearing. The facts involve numerous parties, events, applications, licenses, and often contradictory evidence. The

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Commission's review and comprehension would be better served by a combined set of Exceptions, rather than the concurrently filed individual Exceptions filed by each of the party defendants. Further, the Parties aver that their ability to articulate clearly their exceptions to the Court's Decision would be properly served and the record better reflect for the Commission's Review, by acceptance of these Combined Exceptions, based on grant of Special Permission.

3. For these reasons and for good reasons shown, Ronald Brasher, Patricia Brasher, and DLB Enterprises, Inc. hereby request Special Permission to file their Combined Exceptions attached hereto for the purpose of the Commission's review in lieu of the concurrently filed individual Exceptions filed by each.

Respectfully submitted,

DLB Enterprises, Inc.
Ronald Brasher
Patricia Brasher

By _____
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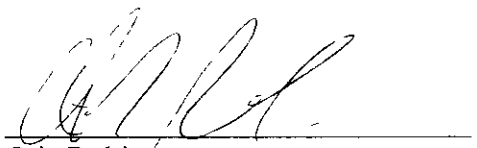
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing Request for Special Permission was served by hand delivery/courier to the below listed parties on this 8th day September, 2003.

Hon Arthur I Steinberg
Administrative Law Judge
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ms. Judy Lancaster, Esq.
Mr. William Knowles-Kellett, Esq.
Federal Communications Commission
Enforcement Bureau
445 12th Street, SW
Washington, DC 20554



Otis Robinson

Before The

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter Of Ronald Brasher, Patricia Brasher, and DLB Enterprises, Inc. dba Metroplex Two-Way Radio Service	)	EB Docket No. 00-156

Before: The Commission

COMBINED EXCEPTIONS OF RONALD BRASHER, PATRICIA BRASHER AND DLB ENTERPRISES, INC.

Submitted September 8, 2003

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Summary/Statement Of The Case/Questions of Law

Statement of the Case: Defendants contend that the Court's Decision is contrary to the dictates of 5 U.S.C. §556(c) and standards of proof articulated in *In the Matter of TeleSTAR, Inc* 2 FCC Rcd. 5, at ¶ 23 (1995) and the burden of proof which the Court properly assigned to the Bureau, yet the Bureau did not meet. Rather, the Decision is based on facts contradicted within the record, which contradiction was provided no decisional weight, and the Court's acceptance of total veracity of that testimony provided by opposing witnesses, which veracity is not found in the record evidence. Therefore, based on a preponderance of all evidence contained in the record, the Court could not have reasonably found Defendants culpable. Accordingly, the Decision should be reversed on review.

Questions of Law Presented: The specific questions of law are, for the Commission's convenience and reference, articulated in the titled sections and subsections of the brief. However, the general questions of law are as follows: Whether the Court erred in its finding of improper specific intent in the actions taken by Defendants, absent evidence of Defendants' knowledge that their actions were, perhaps, not in strict accord with the agency's rules; and whether the Court erred in failing to give weight to any material evidence which contradicted the conclusions put forth by the Bureau; and whether the Court erred in holding that the actions taken by Defendants warrant revocation and disqualification. Defendants claim that the Court did so err and that such error is material and subject to the Commission's reversal on review.

TABLE OF CITATIONS

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Before: The Commission

EXCEPTIONS

1. In accord with 47 C.F.R. § 1.276, Ron Brasher, Patricia Brasher ("the Brashers") and DLB Enterprises, Inc., dba Metroplex Two-Way Radio Service ("DLB") (collectively "the Parties") hereby submit exceptions to those findings published in the Initial Decision of Administrative Law Judge Arthur I. Steinberg, *In the Matter of Ron Brasher, et al* , EB Docket No. 00-156 (Released August 8, 2003) ("Decision"), which Decision arose out of a hearing before Judge Steinberg pursuant to *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing*, EB Docket No. 00-156, 15 FCC Rcd 16,326 (Released August 29, 2000) ("HDO"), which hearing occurred between February 26 and March 9, 2001.

2. The HDO and the Decision presented six issues for determination by the Court pursuant to hearing, assigning to the Bureau in accord with 47 U.S.C. § 312(d) and 47 C.F.R. §1.91(d) the burden of introducing evidence and establishing sufficient proof to establish the first five issues related to existing, licensed facilities; whereas the HDO and Decision assign the burden of proof to the Parties on the sixth issue, related to applications pending before the Commission. (Decision at ¶ 1)

3. The Parties respectfully direct the Commission's attention to 5 U.S.C. § 556(c), which requires that a sanction may not be imposed...except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable,

probative, and substantial evidence. 5 U.S.C § 556(c). As will be fully demonstrated throughout the remainder of these Exceptions, the Decision fails this standard as the findings of fact and conclusions of law contained therein are without reliance upon record evidence and/or are fully contradicted by the record. Although an ALJ is provided substantial latitude as to the credibility of witnesses, the Commission has found that testimonial inferences must then be compared (and/or contrasted) with all other aspects of the hearing record. *In The Matter Of TeleSTAR, Inc.*, 2 FCC Rcd. 5, at ¶23 (1987) and that reversal is proper when supported by substantial record evidence. *Id*, *citing*, *WHW Enterprises, Inc v FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985). In the instant matter, such burden to demonstrate substantial record evidence in support of reversal would be fulfilled because the record fails repeatedly to contain such evidence as the Bureau was required to show to meet its burden of proof or contains evidence that contradicts the Decision.

4. The Decision found that the Enforcement Bureau (the "Bureau") met its burden of proof regarding all five of the first issues and, thus, that DLB had not met its burden on the sixth issue. Pursuant to the Decision, the Court found that all licenses issued to Ron Brasher, Patricia Brasher, DLB Enterprises, Inc dba Metroplex should be revoked and that the Parties should be disqualified from ever holding again a Commission license. The Parties hereby take exception to the Decision as to all six issues and state generally that the Bureau did not introduce sufficient evidence which allowed the Court to reasonably decide in favor of the Bureau on any issue presented for review. For the following reasons, the Parties respectfully request that the Commission, upon review, reverse the Decision and not proceed to revoke the subject licenses or disqualify the Parties from again holding a Commission license.

I. Misrepresentations And Lack of Candor: Issue (a): Whether the Court erroneously found that the Brashers had engaged in misrepresentation and/or lack of candor before the Commission.

5. The issue of misrepresentation and candor divides into two time periods, that period prior to the commencement of the Commission's investigation related to this matter, and the period following that time period.

The Period Prior To The Bureau's Investigation

6. The Court concluded that, "[t]he findings of fact establish, and it concluded, that Ron Brasher made multiple misrepresentations of fact to, and concealed material information from, the Commission in applications he filed with the Commission in the names of others." Decision at 111, and that "Patricia Brasher was complicit in the misrepresentations made by Ron." *Id.* The Parties dispute this finding and request that, upon review, the Commission reverse the Court's conclusion.

(A). Whether the Court improperly ignored the pro se status of the Brashers.

7. It is undisputed that Ron and Patricia Brasher were acting *pro se* in their operation of DLB Enterprises, Inc. and the provision of assistance in the preparation of the subject applications.[1] The Court gave little or no weight to this fact, although it is apparent that the actions taken by the Brashers were largely explainable due to ignorance of Commission rule, policy and procedure. That the Court did not consider this material status of the Brashers and apply that undisputed attribute to their actions is apparent. For, to establish the intent requisite to a finding of misrepresentation, the Bureau must have presented evidence that the Brashers were engaged in *something other* than mere mistake, borne of ignorance. The Bureau must have shown that the

[1] Although the Brashers did employ the services of John Black, a licensing consultant, the Parties were not represented by telecommunications counsel in their actions.

Brashers intended fully to engage in a violation of the Commission's Rules, including those violations which might arise out of the submission of misrepresentations to the Commission.

8. Additionally, for the Bureau to have submitted evidence sufficient to establish its allegation of lack of candor, the Bureau would need to show that the Brashers intentionally withheld material facts from the Commission which the Brashers knew were required to be placed before the Commission. Accordingly, the knowledge and capacity of the Brashers is paramount to establishing the requisite intent to deceive the Commission, which must be shown in support of any finding that the Brashers actions were sanctionable in the manner found by the Court.

9. What is totally lacking in the Bureau's evidence and as a necessary basis for the Court's conclusion is evidence which supports a specific intent to deceive the Commission in the preparation and filing of the subject applications. "Specific intent in this context would include a showing that defendants knowingly intended to deceive the Commission " *Algreg Cellular Engineering*, 12 FCC Rcd. 8148, 8175 (1997) *citing*, *In re Application of Fox Television Stations*, 10 FCC Rcd 8452, 8478 (1995). Although the record clearly shows that the Brashers intended for applications to be filed in the names of the Sumpters (including all persons with the last name of "Sumpter" and Jennifer Hill nee Sumpter) and others, what the evidence does not provide is any document or testimony that supports a conclusion that the Brashers knew that their actions were in violation of law. To the contrary, the uncontroverted record evidence shows that the Parties believed that the Commission's Rules and policies allowed for the filing of applications in other persons' names, including their intended management of the facilities in support of their business. Since the record clearly shows that the Brashers' intention was to act in accord with Commission Rule or policy, then the Parties lacked the requisite intent for a

showing of wilful misrepresentation.

10. Again, the Court's failure to recognize or apply the *pro se* status of the Brashers results in a conclusion that is unsupportable by the record. It is irrelevant whether a person with a more sophisticated knowledge of the agency's rules would have acted in a manner equal to the Brashers. It is only relevant as to whether those actions taken by the Brashers, with their unique knowledge and experience, support a finding of specific intent to deceive the Commission in the preparation and filing of the subject applications. Accordingly, the Court's failure to consider and apply the *pro se* status of the Brashers is reversable error, for which the Parties request remedy pursuant to the Commission's review.

(B). Whether the Court erred in its finding that the Brashers' motive in filing the subject applications evinces an intent to deceive.

11. The facts demonstrate that DLB was in need of additional T-band channels for the purpose of providing service to a large customer, which customer contracted to employ 600-800 mobile units upon the DLB system. Standing alone, this uncontroverted fact demonstrates that the Parties' intent was not to engage in that practice known as spectrum warehousing, but rather to obtain spectrum for the purpose of constructing those channels and providing service, which practice fulfills the intention of the Commission's Rules

12. Through a PCIA representative, Scott Fennell, the Brashers became aware that the Commission's rules and regulation at that time prevented DLB from acquiring more than one T-Band license at a time and that DLB could not apply for further licenses until such time as all channels on the first license(s) were constructed and fully loaded, *see*, 47 C.F.R. § 90.313(c) (Tr. 290-91, 585. *See,* Decision ¶ 15). Ron Brasher received verification of these rule restrictions via John Black, a spectrum licensing consultant. (Tr. 563) Ron Brasher admitted that he believed that

such restriction existed and that his efforts were focused on a method to operate in view of this restriction.(Tr. 563) The record demonstrates that Ron Brasher did not seek professional assistance in the form of telecommunications counsel to assist him in dealing with the restriction under Section 90.313(c). Instead, Mr. Brasher relied on the, perhaps inadvertent, comments of John Black and others that suggested that the restriction might be met by the filing of applications in others' names, which later licensed facilities would be managed by DLB.

13. The Parties never disputed the Bureau's contentions regarding the reason behind filing the applications. In fact, it is only the Brashers' candid responses to Bureau inquiries that permit the Bureau to support the contention. At all times relevant to the Bureau's investigation, the Brashers specifically stated that the licensing challenge of Section 90.313(c) is what led them to consider the filing of applications for facilities which would be held in the names of family members. Never during the Commission's investigation did the Brashers attempt to conceal the reason why applications were filed in the names of others. The record is bereft of any misrepresented facts as to the purpose the applications and licenses might serve, and the Brashers were fully candid with the Bureau regarding this issue.

14. Although the Brashers stated clearly, truthfully, and consistently that their efforts were urged by the demand for substantial service from a large customer and the challenge of the Commission's Rules, the Brashers did not state that their actions were intended to deceive the Commission. Instead, the record shows only that the Brashers sought to exercise a different licensing option which they believed was available lawfully under the agency's rules and policies, i.e. the obtaining of licenses through other persons' participation for the purpose of combining same into a larger radio system.

15. Although the Parties were motivated to obtain channels, this motivation, standing alone as it does, is insufficient to find lack of candor or misrepresentation because it contains a gap in logic and law necessary to demonstrate the Brashers' culpability. The desire for additional spectrum and actions taken to acquire additional spectrum are not, in the abstract, violations of Commission Rule. Indeed, the agency encourages persons to take those actions necessary to obtain licensing for just such purpose. What the Bureau's evidence must show is that the desire was coupled with a specific intent to deceive the Commission and that the Parties knowingly did so act with specific intent to deceive.[2] The Parties aver that the Bureau did not meet this burden and that the Court's finding of this intent is in error.

16. The record shows that Ron Brasher, acting *pro se*, was advised by John Black that *DLB* could obtain multiple T-band channels by using different persons to file license applications and then combining the licenses into one system.[3] Ron Brasher testified that Mr. Black informed him that this was a practice done throughout the industry.(Tr. 586, Decision ¶ 16) Ron Brasher researched this matter and discovered that four, third-party licensees had apparently structured their T-band systems employing licenses in the names of persons other than the primary licensee, i.e employing managed facilities. (Tr. 586-88, Decision ¶ 16) With this information, Ron Brasher reasonably believed that there existed an industry-accepted, legal means to meet his

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[2] Specific intent in this context would include a showing that defendants knowingly intended to deceive the Commission. *Algreg Cellular Engineering*, 12 FCC Rcd. 8148, 8175 (1997); *citing*, *In re Application of Fox Television Stations*, 10 FCC Rcd 8452, 8478 (1995) ("*Fox Television Stations*").

[3] Defendants respectfully note that in his deposition, John Black stated that he does know that people do manage facilities that are in other peoples' names. (Tr. 1734)

licensing challenge.[4] Of great significance for the purpose of the Commission's review, the Bureau never offered evidence or testimony of any kind which contradicted Ron Brasher's testimony, and in the Decision the Court find these facts to be true.

17. Accordingly, the Bureau's primary burden, to demonstrate that the Brashers acted with a specific intent to deceive the Commission regarding the Sumpter applications, was not met. All record evidence demonstrates fully that the Brashers believed that the method of licensing employed was lawful, fully reflective of industry practice, was recognized by the agency as acceptable, and was, therefore, not a deception but a lawful, alternative method of licensing the subject channels.

18. The Parties aver that the Bureau did not meet its primary burden and the Court's Decision is at odds with established law which finds that "[a]n intent to deceive cannot coexist with an actual belief that an act is in compliance."[5] Additionally, the Commission may note that *In re*

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[4] As further evidence of the Brashers' lack of intent to deceive the Commission, the Commission may examine the face of the applications in question.(EB Ex. 19) On each application the Commission will find control point information that provides the address and phone number for DLB/Metroplex. Ron Brasher testified at trial that this consistent provision of identical control point information on third parties' applications, either as an identical address or telephone number, is what alerted him to what other licensees in the Dallas area were doing. His simple review of the Commission's data base showed that other entities had acquired licenses employing third party names, but had listed their address and/or telephone number as the control point on the applications and, later, the licenses. (Tr. 567-71) Therefore, the Parties replicated what they believed to be an acceptable method of licensing and imbued all of the subject applications with an obvious commonality. Yet, the Court found that the Brashers intended to deceive the Commission with a method that places in plain view the common operation of the facilities. The conclusion that the Brashers intended to deceive the Commission in the filing of the subject applications is fully at odds with the Commission's own licensing records. One cannot place material information in plain view of the Commission and concurrently be found to have acted to hide that same information.

[5] *See, Fox Television Stations*, 10 FCC Rcd. 8452, 8478 (1995)

Applications of Rosemor Broadcasting, 54 FCC 2d 394 ¶ 50 (1975), provides further illumination, finding that "persons acting under the belief that their efforts are proper will not be found to possess the specific intent to deceive the Commission." The record is fully silent regarding any alternative reason for the Parties' actions, other than to engage in application practices which the Brashers believed to be lawful. Since the Court is bound by the record, the Decision cannot discount the uncontroverted evidence contained in the record by supplying an alternative theory. Accordingly, insofar as the Decision rests on a finding that an intent to deceive the Commission is a portion of the Brashers' actions in selecting the licensing method proposed, that portion of the Decision is in clear error and must be reversed.

(C). Whether the Court erred in finding that the Defendants engaged in misrepresentation in their use of the Sumpters as licensees.

19. The primary issue regarding the use of the Sumpters as licensees was whether their names were affixed to documents without the knowledge or consent of the Sumpters. A material secondary issue is whether any such unauthorized affixing of such signatures has been shown to have been performed by the Brashers. And, finally, whether, if the former two issues were found to exist, such actions were performed by the Brashers with the intent of deceiving the Commission. Indeed, for the Bureau to have met its burden of proof and for the Court to have before it a record upon which it might rely in finding against the Parties on those issues related to the Sumpter names, all three of the foregoing elements must be clearly shown on the record. As to the first element, the evidence is fully contradictory. As to the second element, the evidence does shows that any such finding is impossible. And, as stated in Section I(B) above, the intent to deceive the Commission is fully undermined by the record.

20. As the Decision properly reports, there was contradictory evidence regarding whether the

names of the Sumpters were employed with their knowledge, participation, and consent. The Sumpters claimed full ignorance as to the matter and offered alternative theories to how their names might have appeared on applications and licenses, without their knowledge or participation. The Brashers contended that the applications filed on behalf of the Sumpters were prepared with the Sumpters' knowledge and consent.

21. The Decision, however, found entirely in favor of the Bureau on all of the above three elements, namely, that the Brashers had falsified or caused to be falsified the relevant documents, without the knowledge and consent of the Sumpters, and that such had been performed with a intention to deceive the Commission in furtherance of the Brashers' desire to unlawfully obtain additional channels for DLB That the Court chose to believe entirely the testimony of the Sumpters was expressed in glowing terms within the Decision.

> In awarding full credit to the testimony of the Sumpters, the Presiding Judge has taken into consideration the nature of the cross-examination of these witnesses by trial counsel for [the Brashers]. Counsel had a deep, booming, voice, and the tone which he employed in his questioning was extremely confrontational, adversarial, and intimidating He could also be sarcastic. Counsel put a great deal of pressure on each of the Sumpters, and a reading of the cold transcript of these proceedings doe not begin to do justice to counsel's considerable skills. That being said, the Sumpters handled themselves exceedingly well in a highly charged and stress situation, and their testimony was forthright, candid, and entirely believable. In contrast, the record of the proceeding as a whole demonstrates a pervasive and consistent pattern of deceit on the part of [the Brashers]. Thus, even independent of the conflict in the testimony of the Brashers and Sumpters, there still exist more than ample grounds for concluding that [the Brashers] were simply not credible witnesses.

Decision at ¶148 (emphasis added). Thus, the Presiding Judge gave full credit to the Sumpters' testimony following an alleged cold reading of the transcript and found that their testimony was forthright, candid, and entirely believable. The Parties aver that a cold reading of the transcript, or more correctly, the record evidence demonstrates that the Court's awarding of full credit to the

Sumpters' testimony was not justified or reasonable. Indeed, the record evidence demonstrates that the Sumpter testimony was replete with inconsistencies, illogical statements, and obvious falsehoods. It is significant that the Court did not employ any balancing test or other means of determining the comparative veracity of the witnesses. Instead, the Court accepted *en toto* the testimony of the Sumpters and employed same to find that the Parties had engaged in deception. Since the record evidence does not support and, indeed, is repugnant to this finding, the Court must be found to have erred in its Decision.

22. The Court's quintessential tipping of the fulcrum of veracity in favor of the Sumpters, and overall reasoning for finding that the Brashers misrepresented facts and lacked candor, rests primarily on three factors: (1) the testimony of the Sumpters and their overall demeanor during the hearing, (2) a credit card receipt showing the purchase of gas in Junction, Texas which was introduced to suggest that Jim and Norma Sumpter were elsewhere when "client copies" of the subject applications were executed, and (3) the testimony of the handwriting expert, Gail Bolsover However, upon reading the cold transcript of this matter, it is apparent that the record is fully repugnant to the Court's reliance upon the Sumpter testimony as "forthright, candid and entirely believable." And if, as is shown fully below, the Sumpter testimony does not warrant this finding, then the Decision must be reversed as it fully relies on this finding.

23. The Commission, upon review, will note that the Sumpter testimony contains general denials and failures to recollect which plague the Sumpters' testimony rendering each less than credible, especially in light of the record facts and evidence which wholly undermine their feigned ignorance. However, illustrative of the Court's failure to employ the whole record, the Court seemingly overlooks the Sumpters' motive to prevaricate.

24. Following receipt of the Net Wave pleading and subsequent correspondence from the Commission, the Sumpters were paralyzed with fear. Jim Sumpter and Jennifer (Sumpter) Hill testified that they were fearful of losing their CPA licenses.(Tr. 1891-1892, 2201, 1099, 1103, 2201, 1366, 1101) Melissa Sumpter testified that she feared the loss of her registered nurse (RN) license.(Tr. 1100-1102, 1367, 2201, 969, 1367-1368) Norma Sumpter feared that she could be thrown in jail.(Tr 2201) Thus, with the filing of the Net Wave Petition, fear ran rampant through the Sumpter family. Not only did they fear that they might be subject to criminal prosecution and monetary fines, as testified, but also they also feared the loss of their careers and livelihood. This testimony and the Court's lack of treatment of it is telling. Although the Court found that the Brashers were sufficiently motivated to deceive the Commission for the sole purpose of obtaining a few additional radio channels, the Court did not recognize the suspect nature of the Sumpters' testimony when motivated by extreme fears, motivations far more potent than expanding a radio system. Yet, the Court does not give any weight or even suggest that the testimony given by the Sumpters might have been altered or tainted in reaction to these fears.

25. Nor did the Court provide sufficient weight to the fact that the Sumpters/Brashers were part of an extended, close-knit, family unit and that the family unit was only split apart following the receipt of the Net Wave petition and after the Sumpters, independent of the Brashers, had several closed meetings among themselves, (Tr. 2202-04, 1965-66, 1413-15, 1104) whereat it was decided to cut the Brashers loose, in the Sumpters' hopes of avoiding criminal penalties or loss of authority to transact their primary businesses, i.e. nursing or accountancy. Thus, the record shows that the Sumpters prepared fully among themselves and in secret what defensive strategy they would commonly employ in the provision of testimony. (Tr. 1966-67, 1793, 1859) Despite

their fears and copious preparation in concert, the Sumpters' testimony simply does not hold water and the Court's awarding of complete confidence in that testimony is not justified by the record.

26. On November 29, 1997, Melissa Sumpter signed and sent to Defendants a letter wherein she stated, among other things, that, "I know you had used my name but I understood that if a channel was awarded then you would immediately transfer it to your name "(Tr. 1347, 1371; EB Ex. 53) On November 29, 1997, Jennifer (Sumpter) Hill and Norma Sumpter signed and sent letters to Defendants with the same assertion as Melissa's letter noted above.(Tr. 1064; EB Ex. 56.; EB Ex. 47) In her testimony, Jennifer (Sumpter) Hill states that she was not surprised that there was an application in her name (Tr. 1117), that she recalled signing a radio application in the early '90's (Tr. 1119) and, with great specificity, Jennifer describes the discussions she had with the Brashers when she signed this application as to why the Brashers needed to submit an application in her name.[6] Melissa also remembers signing an application back in the early '90's (Tr. 1315). Jennifer and Melissa also claimed that their only knowledge regarding their individual participation in FCC related matters dates back to the early 1990's, and that they had nothing to do with the T-band applications filed in 1996. They claim that their statements in the

[6] Tr. 1119. After testifying that she thought she signed a radio application in the early 90's, FCC counsel, Mr. Knowles-Kellett, posed the following question to Jennifer (Sumpter) Hill, "Do you know if you had a discussion of what it [something her Aunt Pat gave her to sign] was at that time?" In response, Ms. Hill stated, "It seems like the discussion, and I can't remember exactly who discussed it, when and what, but it always seemed to be the discussion was that Ron could only acquire so many licenses in his name, okay? And if I had a license in my name, he could have them transferred to him, so he was trying to get these licenses and he would get them in our names and have them transferred to him. But I don't know who discussed that or how I know that, I just know that's always how it was discussed. And I never asked questions. End of story."

letters of November 29th relate to the applications they allegedly signed in the early '90's.(Tr 1346) Jim and Norma support their daughters' claims and, furthermore, claim their own individual ignorance to that 1996 T-band applications. However, these collective assertions by the Sumpters are not entitled to the Court's finding of accuracy and forthrightness, as the record shows that the Sumpter testimony is obviously false.

27. To be believable, the Sumpters' testimony required confirmation by the Bureau's presentation of application information or licenses which arose out of Jennifer and Melissa's alleged participation in signing applications in the "early 1990s." Given all of the information and historical records of the agency, the Bureau did not present even a single shred of evidence which showed that any such applications were filed with the Commission or prepared by anyone The Bureau did not present a file number, evidence of frequency coordination (the committees maintain careful records), an application copy, a license, a computer record, nothing which provided support to the convenient claims of the Sumpters. The Sumpters' bald assertions, which were fully capable of FCC record confirmation, were entirely unsupported. The Court makes nothing of the Bureau's obvious failure and the more obvious implication that such failure represented, the Sumpters lied.

28. The November 29, 1997 letters, read in context of when each was sent and in conjunction with Jennifer (Sumpter) Hill's testimony recited in Footnote6, fully demonstrate that the feigned ignorance of the Sumpters regarding the 1996 T-band licenses is not credible. The content of the letters and Ms. Hill's testimony are fully consistent with the Sumpters' knowledge of their participation in the preparation of the subject applications, not some unidentified, mysterious applications prepared in the early 1990s. Her testimony shows that she willingly signed a

document related to forwarding the T-band licenses and thereby acquiesced to, and had full knowledge of, the filing of a 1996 T-band application in her name.[7] There is no other logical conclusion, thus, the Court's finding was in obvious error.

29. What the record also does not show is any reason why the Sumpters' participation would have been at all useful in the early 1990s. Jennifer's testimony that her participation arose out of some, then existing need of the Brashers to obtain channels which DLB could not obtain without such assistance, is unsupported by record evidence and contradicts other portions of the record evidence upon which the Court relied. In its Decision, the Court relies upon the Brashers' having engaged in the use of Sumpters' names for the express purpose of dealing with the limitations arising out of Section 90.313(c) of which the Brashers contemporaneously became aware from information received by Scot Fennel and John Black. The Decision finds that the Brashers commenced their scheme based on this information and determined that a method of circumventing improperly the Commission's Rules was based on this information. However, the record demonstrates that the information was received after the early 1990s and immediately prior to the filing of the subject T-band applications. Thus, the Court's findings are clearly contradictory. The Court cannot assign knowledge to the Brashers in the early 1990s, in support of the Court's treatment of Jennifer's testimony, which information the Court found was not possessed by the Brashers until 1996.

30. Nor does the record reflect any reason why the Brashers would be applying for licenses in the early '90's under Jennifer's name Jennifer, herself, states with great particularity the

[7] Use of another's name, with permission, to sign an accurate filing held not intentionally misleading. *In re Application of Alden Communications*, 3 FCC Rcd. 5047 ¶ 5 (1998).

substance of conversations surrounding her signing of a radio application. The substance of that conversation being that DLB needed licenses, that DLB could acquire only so many licenses in its and the Brashers' respective names, that either DLB or the Brashers could apply for licenses in Jennifer's name and, lastly, that once a license was granted, the Brashers would transfer such license out of Jennifer's name, *see*, Footnote 6. Although Jennifer claims this was in the early '90's, nothing in the record shows that the Brashers were in need of licenses in the early '90's, that the Brashers applied for licenses in Jennifer's name in the early '90's, and that Brashers could only apply for a certain number of unidentified licenses in their own names in the early '90's.[8] Indeed, the record evidence shows clearly that the Brashers would not have felt any such need. As late as June 26, 1996, an application filed in the name of Patricia Brasher awarded five T-band channels based on a single application under the call sign WPJI362 (EB Ex. 19 at 296) and a license was awarded to Ron Brasher for five channels under call sign WIL990.(EB Ex. 19 at 359) Thus, the record shows that the Brashers' knowledge of the limitation contained within Section 90.313(c) was obtained *following* the date that those applications were prepared, because the licenses evince that prior to that date, the Brashers believed that multiple channels could be obtained on a single license, a belief confirmed by the Commission via grant of those multi-channel applications.

31. Despite her effort to illuminate the collective excuses of the Sumpter family, Jennifer's testimony does quite the opposite, as does the testimony of the other Sumpters in confirming their individual and/or collective participation in the preparation and filing of applications in

[8] The record only shows that Norma, not any other Sumpter, filed for and was granted a license in the early '90's, which license was used for a phone that was put into Jennifer's car.

their names. All evidence and logic, outside of the harmonized testimony of the Sumpter family arising from closed family meetings, demonstrates fully that the Sumpters' shared claims regarding applications in the early 90's is fully unsupported, is attributable to participation in the T-band applications and licenses of 1996, and is simply not believable. The Court's failure to note these obvious inconsistencies in its determination that the Sumpter testimony was wholly and completely factual and believable, is without factual or logical support and is material error.

32. With Jennifer and Melissa admitting to having signed applications or documents related to a FCC license application, and with the Bureau's failure to offer any evidence other than the Sumpter testimony, which is motivated by fear of reprisal by the agency, a preponderance of the evidence should have led the Court to conclude that Jennifer and Melissa, in fact, signed documents related to the 1996 T-band applications– evidencing full knowledge and awareness of the subject applications. At the least, the Court must have discussed and dismissed the likelihood of such a logical conclusion based on record evidence in support of an alternative conclusion. However, the Court does not reach and weigh the evidence regarding this obvious contradiction between record facts and Sumpter testimony. Instead, the Court gives a ringing endorsement to the Sumpters' testimony at paragraph 148 of the Decision and, thus, ruled in clear contradiction of the record evidence

33. Nor did the Court note other obvious problems with the Sumpters' testimony. The Sumpters all testified that it was their common procedure to forward all FCC related mail that each received to the Brashers. (Tr. 1054-55, 1844-45, 1954, 2077-79, 1375) In so testifying, each of the Sumpters admitted receiving such mail. Jim, Norma, Jennifer and Melissa all claim to have received FCC related mail and to have forwarded such to the Brashers.(Tr. 1054-55,

1844-45, 1954, 2077-79, 1375) Yet, the record evidence demonstrates that there are only two reasons why any such mail would have ever been sent to any of the Sumpter family: the licenses granted to Norma and, much earlier Jim, for use of end units, and the T-band applications and licenses of 1996. Since there exists no evidence that a license was granted to Jennifer or Melissa at any time prior to 1996, there is no reason why Jennifer and Melissa would be receiving mail from the FCC or a frequency coordinator prior to the filing of the 1996 T-band applications. Thus, there would have been nothing for Jennifer and Melissa to forward to the Brashers other than those documents related to the 1996 T-band applications. Again, the Sumpters' testimony does not withstand logic and the Court should have recognized this problem in the Decision.

34. That the Court did not properly take into account the obvious contradictions regarding the Sumpters' receipt of mail from the Commission is, perhaps, best illustrated by Jennifer's testimony that she received directly from the Commission at her home the request for construction information (FCC Form 800A) to verify construction of the T-band facility licensed in her name under call sign WPJR740 and that upon receiving it, she threw it out, because, in her words, "I was angry. I felt like [Ron] was blowing me off." (Tr. at 1061) By Jennifer's testimony, the 800A was in a landfill, but the record evidence shows that Ron Brasher filled out the 800A and requested through Jim that Jennifer sign the 800A (Tr. at 1061-1062 and 1966 and 1978). There is no way that Ron Brasher could have filled out the 800A and requested that Jennifer execute it if she had, as testified, previously thrown the document away. In sum, Jennifer misrepresented facts to the court. No other conclusion is possible, but the Court did not note this obvious, material misrepresentation.

35. Additionally, the conclusions within the Decision ignore the obvious interpretation and

relevance of the correspondence between the Sumpters and the Brashers. Taking into consideration Jennifer's testimony and the November 29th letters of both Jennifer and Melissa, *see*, ¶ 26 above, reason compels one to conclude that Jennifer and Melissa were fully aware of the 1996 T-band applications filed in their names. And given the Sumpters' collective, shared and concerted efforts to avoid any consequences of their knowing participation in the applications, a preponderance of the evidence leads one to conclude that all the Sumpters, not just Jennifer and Melissa, were fully knowledgeable about the 1996 T-band applications.[9] Further, after their receiving the Net Wave Petition, none of the correspondence from the Sumpters to Defendants, except the one letter from Jim referenced in Footnote 9 hereto, states that they did not consent to the filing of applications in their respective names in 1996. Yet, all record correspondence shows full knowledge and awareness, a finding that the Decision should have reached instead of the unsupportable conclusion that the Sumpter testimony was "entirely believable "

36. As a last-minute effort to shore up their testimony, the Sumpters presented at trial, without prior notice to the Parties, a credit card receipt showing the purchase of gas in Junction, Texas on June 23, 1996, by Jim Sumpter.(Tr. 1797-98, 2032, Eb. Ex. 70) Although the date is questionable in its relevance given the fact that June 23rd is a day following that date upon which the Brashers testified that the "client copies" were executed by the Sumpter women at meeting

[9] The Parties note that at all times relevant only Jim Sumpter stated that he had no knowledge that his name had been used. *See* EB Ex. 39. However, Jim Sumpter later stated by letter dated December 20, 1997, directed to Ron Brasher that, "My application for a license was your idea and strictly for your benefit." *See*, EB Ex. 40. The Parties further note Norma Sumpter's letter dated December 20, 1997, directed to the Brashers wherein Norma states, "My application for a license was your idea and strictly for your benefit." *See*, EB Ex. 48.

where the Brashers had stated repeatedly that Jim was not present, the Court nonetheless gives great weight to this document. Decision at ¶ 147) The relevance added to the document arises out of Jim and Norma's testimony that the gas was purchased when together they went to visit a sick aunt on that weekend, including the previous day of June 22nd, when the client copies were alleged to have been signed in accord with the date shown on those copies.(Tr. 2032-2041, 1797, 1805-1810) Accordingly, standing alone the receipt only tends to prove the absence from the Dallas area of Jim Sumpter on a date following the relevant date. Only by the sudden, unexpected, recollection at trial of the shared memory of Jim and Norma Sumpter that the receipt relates to a belatedly recalled trip that allegedly included the previous day, does the receipt gain any potential relevance at all. However, the receipt does not explain, even with the convenient testimony of Jim and Norma, the contradictory testimony of Ms. Bolsover, (more fully discussed below) that the signatures on the client copies appear to be the genuine signatures of Norma, Jennifer and Melissa.

37. Jim and Norma both claim to have left for Junction on Friday, June 21, 1996, and returned to their home on June 23, 1996. (Tr. 2032-2041, 1797, 1805-1810) To show that Norma could not have been in the Defendants' kitchen signing the client copies on June 22nd, the Bureau offered into evidence the above described credit card receipt from use of a corporate card employed by Jim Sumpter.(Tr. 1808) As an initial matter, the receipt does not demonstrate that Norma was in Junction at any relevant time. However, relying entirely on Jim's and Norma's testimony that Norma always accompanies Jim when he visits his aunt, the Court concluded that Norma could not have been in Defendants' kitchen signing a client copy on June 22nd. (Decision at ¶ 147)

38. Defendants find this evidence and testimony highly suspect, and respectfully direct the Commission's attention to the fact that this trip was never brought to light in the years preceding the hearing, not even in the earlier depositions of both Jim and Norma. It was well into the hearing, and only a few days before their testimony, when Jim and Norma allegedly recalled this trip. Norma allegedly remembered this trip the Thursday before her testimony and shared this recollection with her family, the Sumpters' counsel and Bureau counsel.(Tr. 2032-33) However, counsel for the Parties were not made privy to this revelation until the day of Jim's testimony. (Tr. 1808-1816) Accordingly, this allegation and the associated receipt came as a complete surprise to the Parties, who were not allowed an opportunity to test the validity and relevance of the receipt and the associated testimony. The Court's decision to allow the entrance of the evidence fully prejudiced the Parties and their right to due process, including the ability to examine and consider the evidence prior to trial.[10]

39. With the Court having dismissed Jennifer and Melissa, who returned to Texas previously after giving their respective testimony, the Parties could not ask them whether, in fact, Norma always accompanied Jim when Jim visited his aunt in Junction, or whether Norma did, in fact, do so on the relevant date. No affidavit was presented from the aunt confirming the tale. No additional evidence tying the receipt to the subject previous day was offered by the Bureau. Instead, the Bureau relied solely on the last-minute ambush of this testimony and requested that the Court accept all statements related to the document as fully factual. The Court improperly obliged the Bureau in its Decision. The Parties aver that the Court erred in accepting the

[10] The date of exchange of Direct Exhibits was January 5, 2001, whereas the Bureau first revealed and offered the Direct Exhibit on March 2, 2001, some two months later.

testimony and documentary evidence in the first instance, since such acceptance was done without providing to Defendants an ability to adequately challenge the veracity of the witnesses statements or the relevance of the receipt, thus, reducing to a nullity the Parties' due process rights. However, even following the questionable introduction of this evidence, the Court erred in failing to weigh the manner by which this evidence was entered and the Parties' inability to challenge such surprise evidence, instead assigning wholehearted credence to every drop of testimony and great relevance to the receipt.

40. That Jim was absent from Dallas on the subject date, June 22, is not challenged by the Parties. In fact, the Brashers' testimony is buoyed by Jim's admission of his absence. The Brashers testified that Norma, Melissa, and Jennifer visited the Brasher home on the 22nd and executed the client copies.(Tr. 403-409, 825-26) Jim was not in attendance and his visit to Junction fully explains his absence from that meeting. What the Brashers and Sumpters disagree upon is whether Norma was at the Brasher home or with Jim. The executed client copy with Norma's signature upon it, dated on June 22, places Norma at the Brasher home. The credit card receipt dated June 23rd does not contradict this evidence. The Decision incorrectly gives no weight to the executed client copy and gives great weight to the credit card receipt

41. The Court's Decision regarding the executed client copy with Norma's signature affixed thereto and the Court's discounting of the significance of that document is based on the Court's finding that the client copies were fraudulently produced.(Decision at ¶ 146) In essence, the Court found that the signatures of the Sumpter women were forged onto the client copies. Yet, this finding cannot withstand simple logic. The Sumpter applications equaled four, one each in the names of Jim, Norma, Melissa and Jennifer. The Court found that the Brashers were

motivated to engage in deceit, lack of candor, and all forms of trickery. Yet, the Court's characterization of the Brashers is belied by one simple truth, only three of the client copies were executed. There is no client copy with Jim Sumpter's signature upon it because, as Jim testified, he was in Junction. Were the court's theory plausible, a client copy with Jim's name upon it would have been supplied by the Brashers during the Commission's investigation.[11] There would have been no reason for the Brashers to exclude one client copy among four if the Court's theory is correct, unless no such copy were ever made because the Brashers' testimony was accurate about the absence of Jim alone. Stated directly, if the Brashers had been forging signatures, they would have forged all four, not stopping short at three. That the Court did not note or give weight to this unexplained "restraint" by the Brashers is telling. It demonstrates that the Court did not take into consideration all of the record evidence and the logical inferences of that evidence in arriving at its conclusions.

42. The Court gave substantial weight to the testimony of the Bureau's handwriting expert, Ms. Bolsover, however a careful reading of Ms. Bolsover's testimony does not support the weight given or the Court's conclusions. Ms. Bolsover's testimony is vague, inconclusive, and does not provide that evidence required for the Bureau to have met its burden of proof. With regard to the Sumpters, the testimony of the handwriting expert is relevant to only two issues in this case: (1) the origins of the signatures on the 1996 T-band applications filed with the Commission ("original applications"), and (2) the origins of the signatures on the client copies.

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[11] Indeed, as the Brashers' accountant, Jim's signature would have been the one most readily available to the Brashers for the purpose of tracing, lifting or copying. Yet, despite the ready availability to the Brashers of numerous examples of Jim's signature from which to choose, the Court found that the Brashers opted to affix only the less available signatures of the Sumpter women. The Court does not explain the basis of its strange decision.

Original Applications

43. With regard to the original applications, Ms. Bolsover's testimony is summarized as follows:

i.) She found that the signatures and dates found on the original applications of Norma, Jennifer and Melissa appear to have been written by one writer; however, she was unable to identify the writer.(Tr. 2304)

ii.) She found that it is "probable" that the signatures on the original applications of Norma, Jennifer and Melissa were written by the same person. (Tr. 2321-22) Of the three basic categories of identification (positive identification, highly probable, and probable) employed by Ms. Bolsover, "probable" is the least certain. (Tr. 2300)

iii.) She was able to determine that the signatures on the original applications of Jim, Norma, Jennifer and Melissa were not their genuine signatures.(Tr. 2345)

iii.) She eliminated Ron Brasher as the writer of the signature appearing on Jim's original application. (Tr. 2319)

iv.) She was unable to determine if the writer of Jim's original application was the same writer of the original applications for Norma, Jennifer and Melissa– "[t]he characteristics were not the same." (Tr. 2321)

v.) She was specifically requested to identify the author of the original applications for Jim, Norma, Jennifer and Melissa; however, she was unable to identify the author. (Tr. 2343-45) She could not identify or eliminate anybody as the author. (Tr. 2345)

44. The Parties aver that Ms. Bolsover's testimony is inconclusive and, subsequently, any reliance on this testimony, and inferences derived therefrom, are highly debatable. All this

testimony proves is that she could not testify as to who put pen to paper on the original applications of the Sumpters. Although Ms. Bolsover states that the signatures appearing on these original applications are not the genuine signatures of each Sumpter, she could not identify or eliminate any of the relevant parties as the true writer. Specifically, after reviewing numerous handwriting examples[12] from all family members, Ms. Bolsover could not determine who wrote the names on the original applications Thus, the Bureau cannot be deemed to have met its burden in proving that the Brashers knowingly caused improperly executed documents to be filed with the Commission.

45. That Ms. Bolsover testified that Ron was not the penman of the subject signatures on the original applications and could not testify regarding who else might have penned the signatures, Ms. Bolsover's testimony does not forward the Bureau's case an inch. In fact, the Bureau loses substantial evidentiary ground. The Bureau's case is that the Brashers caused the signatures to be penned on the applications by persons other than the Sumpters, and at a time when the signing was not under scrutiny. Yet, despite the lack of scrutiny and during a time when the Brashers were found by the Court to be cavalier in their actions before the agency, Ms. Bolsover's testimony does not show that either of the Brashers caused the signatures to be affixed. To, therefore, conclude without evidence that the Brashers caused the signatures to be affixed is a leap across a lacuna of logic. The lacuna is errantly filled by the Court in its conclusion of forgery, from which one is left to try to backfill with facts that simply are not on the record. The

[12] The Brashers willingly provided to the Bureau several examples of their handwriting, including ten original signatures for analysis. Despite the Brashers' willing cooperation in the study, Ms. Bolsover did not find that either Ron or Patricia was the person who signed on behalf of the Sumpters.

most salient missing evidence is any fact supporting a showing by anyone that either of the Brashers performed the act of affixing the signatures. The Bureau presented no such facts or testimony and, thus, the Court erred in relying on non-existent evidence.

46. The Parties respectfully note that even if the Sumpters did not execute the original applications, such absence of original signatures does not support a finding of misrepresentation. The Commission has found *In The Matter of Danville Television Partnership,* 16 FCC Rcd. 9314 (2001)("*Danville*"), that where a party signed the name of another to a document that was submitted to the Commission, and the person signing the document reasonably believed that the other party consented to such act, that no motive to misrepresent was present. In *Danville* the Commission also properly took note of the fact that, at the time of the document's filing, the parties were not then adversarial, and it seemed unlikely that the other party would have withheld consent to the signing of their name. There exists substantial evidence on the record that the Sumpters and Brashers were extremely close during the relevant time during which the original applications were filed and that the Sumpters would have consented to the preparation of applications in their name Yet, the closeness of the family unit was not taken into consideration by the Court in its Decision and, thus, the court's conclusion is at odds with *Danville*. *Danville* makes it patently clear that misrepresentation, concealment, or lack of candor will not always be found when documents are submitted to the Commission under a person's name with the signature of that person signed by another. Knowledge and acquiescence to the signing of one's name vanquishes all notions of forgery and, thus, any finding of misrepresentation. Numerous

decisions of various courts are fully consistent with this approach.[13]

47. Given the status of the Sumpters and Brashers, a close family unit that participated in business together, shopped together, and visited each other regularly, (cited below) the court must have, in accord with the standards articulated in *Danville*, looked beyond the denials of the Sumpters to determine whether additional evidence of consent or acquiescence by the Sumpters was present. With the Bureau unable to provide any evidence of the penman of the signatures and, in fact, ruling out Ron Brasher, the issue then moves from one of forgery by the Brashers, since none could be shown, to one of knowledge and consent. As shown above at ¶¶ 26-35 above, it is apparent that the Sumpters had knowledge of the applications having been filed in their names.

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[13] A signature to an instrument may be attached by (1) the hand of a party thereto, (2) by the hand of another at the request of a party, or (3) by means of the mark of a party when he is unable to write his name, *Pitney v Pitney*, 202 P. 940 (Cal. App. 1 Dist. 1921); *see, also, Kadota Fig Ass'n of Producers v Case-Swayne Co et al* , 167 P.2d 523, 527 (Cal. App. 3 Dist. 1946) where it was found that a party may adopt his signature written by another person, as valid and binding, by subsequent approval or ratification, even though the signature was originally forged; *see, also, Volandri v Hlobil*, 339 P.2d 218, 220-221 (Cal. App. 1959) "[o]rdinarily, the law requires that a principal be appraised of all the facts surrounding a transaction before he will be held to have ratified the unauthorized acts of an agent. However, where ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable man upon inquiry, he may be held to have ratified despite the lack of full knowledge"; *citing, Hutchinson Co. v Gould*, 181 P. 651, 653 (1919); *see, also,* Locke, *Ratification of Forged or Unauthorized Signature*, 7 P.O.F. 2d 675, 682 where a principal accepts property as a consequence of an unauthorized act and retains such property after discovering the circumstances without repudiating the act, this conduct indicates an intent to ratify; *see also Hefner v Vandolah*, 62 Ill. 483 (1872) where it was found that to establish ratification, it is not necessary that there had been any previous agency created; *see, also, Unauthorized or Forged Signature*, 3 Am. Jur. 2d Agency § 192 (1986) which gives a checklist of facts and circumstances tending to establish that the signature of one person forged on an instrument by another was effectively ratified by the person whose name was signed. Such facts and circumstances include: ratifier's knowledge, ratifier's failure to repudiate transaction, and ratifier's recognition and approval of similar forgeries by signer.

48. Each Sumpter executed and sent to Defendants letters wherein each Sumpter exhibited full knowledge that the original T-band applications were filed in their respective names. Jennifer and Melissa testified that they each signed documents related to applying for a radio license and, although both claim that this was in the early '90's, the record indicates that the documents signed by both Jennifer and Melissa relate to the 1996 T-band applications. Jennifer "knew something was going on when [she] had gotten the card" (the card being a PCIA frequency coordination notification), but Jennifer never questioned nor objected to having a 1996 license application filed in her name.(Tr. 1120) Lastly, by the Court awarding credence to Jennifer's testimony that Ron told her "once [she] had signed an application...he could use [her] name again and again," Jennifer, then, effectively acquiesced to the filing of the original application in her name by failing to object to Ron's alleged statement.[14] Undermining this absurd statement by Jennifer is, of course, the Bureau's inability to demonstrate that Jennifer had ever applied for a license prior to the 1996 T-band application. Thus, Jennifer's statement is out of thin air and without any facts to demonstrate that it could have ever been occurred as claimed.

49. Further, as in *Danville*, it is uncontroverted that the Sumpters and Brashers were not adversarial during the relevant period and, thus, in combination with the other record evidence, no finding of misrepresentation is appropriate. Additionally, the record evidence shows that both Jim and Norma had been Commission licensees in the past (the record shows that Jim retained an end user license in the late eighties (Tr 347-48, 540), and Norma received a 900 MHz license in

[14] The Parties note that in its opinion (¶ 143) the Court conveys an uncanny picture of Ron by reciting to this part of Jennifer's testimony found at Tr. 1059; however, the Court fails to disclose that Jennifer could not recall verbatim what Ron said in this conversation she references, only that it was "the gist of the conversation."

the early '90's (Tr. 390, 2124, Eb. Ex 42 at 2)) thus, their willingness to be a Commission licensee is fully established. There is no evidence presented by the Bureau or relied upon by the Court which even suggests that Jim and Norma would not have agreed to participate in the filing of the 1996 T-band applications. In fact, Norma specifically states in her hearing testimony that there was no reason why she would not have complied if Defendants would have asked that she participate in the filing of the 1996 T-band applications.(Tr. 2227-29) Since the Court remarkably accepted the testimony of Jennifer and Melissa regarding their participation in applications prepared in the early 90's, the Court should have inferred that equal consent would have been given for participation in the 1996 T-band applications. Accordingly, even if Ms. Bolsover's testimony could have shown that either of the Brashers were the penman of the original applications filed in the names of the Sumpters, which it did not, the Court could not have reasonably concluded, applying the standards of *Danville*, that a misrepresentation had occurred.

50. The record before the Court was uncontroverted about the relationship of the Sumpters and the Brashers during the time the T-band applications were prepared and filed. All constituted a close family unit. There is no evidence of any adversarial relationship. And there is substantial record evidence to show that the Sumpters had specific knowledge regarding the T-band applications. Taken together, a preponderance of the evidence that appears on the record, leads to an ultimate conclusion that misrepresentation cannot found based on facts before the Court. Added to that evidence is a final, logical element which the Court failed to explore to its logical legal conclusion. Neither the Bureau nor the Court explain why the Brashers would have caused falsified documents, employing the Sumpters' names, to be submitted to the Commission, when

the genuine articles were readily available upon request.

51 It is not sufficient to point to the licensing challenges presented by Section 90.313(c) and the Brashers' desire to obtain channels for DLB's use in serving customers. That motive only extends to obtaining additional spectrum It does not extend to the method and it does not explain the actions which the Court concluded the Brashers took in obtaining the subject channels. The Brashers and the Sumpters were a close family unit who spent much time together (Tr. 1793); Patricia Brasher and Norma Sumpter were sisters that spent just about every Saturday together (Tr. 1073); Jennifer and Melissa quite often accompanied Norma and Patricia on their weekend shopping trips (Tr. 426-27, 826); the Brashers employed Jim as the accountant for their business and stopped by his office quite frequently (Tr. 84, 1739); both Jim and Norma were prior holders of FCC licenses via their close relationship to the Brashers (Tr. 540, 347-48, 390, 2124, EB Ex. 42 at 2); and Norma testified that she would have participated in the T-band channels if asked by the Brashers.(Tr. 2227-28) Accordingly, the mountain of evidence provided by all of the relevant witnesses shows again and again that the Brashers knew that the Sumpters would not refuse to participate in the preparation and filing of the subject applications. This knowledge fully established, there can be no plausible reason found for the Brashers to have engaged in the falsifying of the Sumpter names upon the applications. The record shows that the Brashers asked family members, Thomas Lewis and Carolyn Lutz, if they would like to apply for licenses (Tr 1158, 707); yet, the Court did not take into account the anomalous assertion that the Brashers would ask some family members, but act inconsistently with others. In sum, the Court's conclusion regarding the Brashers' alleged actions is repugnant to the record and is not supported with logic. The burden of proof is upon the Bureau to explain these inconsistencies in

its assertions, however, the record shows no explanation of these contradictions. Thus, the Court erred in finding that the record supported any finding that the Brashers engaged in misrepresentation in the preparation and filing of the T-band applications in 1996.

Client Copies

52. With regard to the three client copies for Norma, Jennifer and Melissa, Ms. Bolsover's testimony is summarized as follows:

i.) She determined that Norma Sumpter probably wrote the signature on the subject client copy. (Tr. 2326)

ii.) She determined that Jennifer Hill probably wrote the signature on the subject client copy. (Tr. 2326)

iii.) She determined that Melissa Sumpter probably wrote the signature on the subject client copy. (Tr. 2326-27)

iv.) She believed that the signatures appear to be the genuine signatures of Norma, Jennifer and Melissa. (Tr. 2361)

v.) Her certainty is "probable" because of the poor quality of the photocopies she was given to inspect. (Tr. 2327)

vi.) She determined that, in her expert opinion, there was nothing to suggest that the signatures were traced, but that the photocopies were so poor, she really couldn't see. (Tr. 2335-36) She could not tell if any of the signatures were put on the client copies by any means other than having been originally written on the pages by the represented party. (Tr. 2363)

vii.) She determined that there was no basis to conclude that the signatures appearing on documents sent to the Brashers signed by Norma, Jennifer and Melissa, were cut

and pasted onto the client copies. (Tr. 2340)

viii.) She determined that the dates on the client copies of Norma and Jennifer were the same handwritten entry. Tr. 2343-44. "The two dates were identical." Tr. 2361.

ix.) She did not find any evidence that someone had attempted to "simulate" the signatures. Tr. 2350-52.

53 Given the testimony of the Bureau's expert witness, Ms. Bolsover, one is left to wonder how the Court could have concluded that the Brashers engaged in a misrepresentation regarding the T-band applications and the Sumpters' participation, with knowledge and consent, in those applications. Yet, remarkably, the Court still found the Brashers culpable.

54. At Decision at ¶¶ 95-96, the Court appears to counter the Bureau's expert witness' testimony with the testimony of Jim and Norma regarding their alleged joint trip to Junction, Texas. Oddly, the Court's efforts to defeat one of the Bureau's witnesses is based on the contradictory testimony of additional Bureau witnesses, Jim and Norma, whose testimony conflicts with the testimony of Ms. Bolsover. More specifically, the Court relied on the testimony of Ms. Bolsover only to the extent that it might support the Court's conclusion that Jim and Norma were truthful, then discounted the remainder of Ms. Bolsover's testimony. This manner of weighing evidence is entirely inappropriate given the fact that the evidence was provided by three *Bureau* witnesses.

55. Regarding Jim and Norma's testimony, the Court finds that the following support their joint belatedly remembrance: (i) Jim's appointment book (EB Ex 70, p.5), which only shows that Jim intended to be out of his office on the afternoon of June 21, 1996 and which does not indicate the whereabouts of Norma or Jim on the relevant date of June 22; (ii) a credit card receipt which

purports to be evidence of payment for a lunch taken by Jim and Norma on June 21, near their home in Mesquite, which receipt does not place Norma outside of the Dallas area on the relevant date of June 22 (EB Ex. 70, 12-13); and (iii) the credit card receipt for gas purchased in Junction on June 23, which does not indicate that Norma was with Jim when the gas was purchased. Accordingly, the documentary evidence which the Court states supports Jim and Norma's testimony indicates, at best, that Jim was not at home on the relevant date of June 22. (EB Ex. 70, 12-13) That is the sole inference which is established by the documents. That inference is supported by Ms. Bolsover's testimony and the Brasher testimony, that show that the client copies did not include Jim's signature and that Norma's genuine signature was affixed to the client copies.

56. The Court further relies on Ms. Bolsover's statements that she could not be more certain about the signatures on the client copies due to the quality of the copies, including she could not testify whether the signatures were original to the copies, *see*, Decision at ¶ 97. Remarkably, the Court found what the expert witness could not. Although the Bureau's expert witness testified clearly that she could provide no opinion regarding whether the signatures were original to the documents, the Court's Decision concludes that it has this ability, and found that the signatures were not original to the client copies. Accordingly, the Court replaced improperly the record evidence with its own opinion. Even more troubling is that the Court's Decision shifted the burden of proof from the Bureau to the Parties. In effect, the Court found that absent a definitive statement from the expert witness that the signatures were original to the client copies, the Court was free to conclude that the signatures were not original to the documents Since it is, at least, equally likely that the signatures were original to the documents, the Decision is based in large

measure on a misapplication of the burden of proof, obliging the Brashers to prove that the signatures are original to the client copies or risk being found culpable. The Court's application of the record evidence and the burden of proof attaching thereto, are in obvious error. In contrast, the Commission must note that nothing in Ms. Bolsover's testimony can lead one to believe that the client copies were signed by anyone other than Norma, Jennifer and Melissa.

57. To support its conclusion, the Court reviews the testimony given by Ms. Bolsover regarding the date appearing on the client copies. (Decision at ¶¶ 145-46) The relevance of this testimony is somewhat vague given the fact that since the expert witness testified that the signatures were genuine, any issue regarding the dating of two of the client copies is almost entirely moot. However, Ms. Bolsover states that two of the three executed client copies appear to evidence a mechanically reproduced date, i.e. a photocopy of the date. Again, the Court overlooks a lacuna of logic in employing this opinion as evidence of mischief. If, as the Court concludes, the client copies are not genuine, then why would the date be mechanically produced on only two of the three copies? Obviously if the Brashers were intending to falsify a set of documents, the method would be equal across all. Yet, Melissa's client copy does not show any evidence that anyone reproduced a date mechanically thereon. That two copies might evince a mechanically produced date, while one does not, evinces moreover that the copies were prepared in the normal course and not pursuant to some deceptive means. That Melissa's copy does not evince a mechanically produced date leaves the Court with evidence that shows that Melissa's client copy contains her genuine signature, without any further implied taint via the date. Thus, the Court's conclusion would need to stand against the unrebutted testimony of Ms. Bolsover that Melissa's client copy appeared genuine in all respects.

58. Again, the Bureau does not explain the alleged "restraint" of the Brashers in the purported creation of the client copies. As explained above at ¶ 41 herein, the Bureau could not and did not attempt to explain why the Brashers would allegedly forge the Sumpter women's signatures onto client copies, but not Jim Sumpter's Now, the Bureau cannot explain and does not explain why the Brashers would allegedly "doctor" the date on two of the executed client copies, but not on the third. A logical preponderance of the evidence would have concluded that, at best, the Bureau provided no evidence of misrepresentation regarding the client copies as it relates to the dates thereon. Rather, the expert witness testimony could be found to be nothing more that a small allegation in proving the Bureau's questionable theory and that the Court's resulting conclusion required an unjustified leap of logic, skipping ahead to a conclusion of fact and law, for which no factual avenue exists, if, indeed the condition of the dates on the two client copies is relevant for any purpose.

59. Not bothered by a plain reading of the record, in its Proposed Findings of Fact and Conclusions of Law, the Bureau, in an failed attempt to meet its burden, employs an unsupportable and highly questionable spin on the testimony and facts to generate an inference favorable to its case as to the legitimacy of the client copies. The Bureau states, in pertinent part, that "[i]n addition, the handwriting expert's observations about the 'Client Copies' indicate that signatures were lifted from other documents.[15]" The Bureau further states, "[i]ndeed, once [the Brashers] obtained signatures from the Sumpters in early 1998, it had the means to lift such

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[15] *See*, Bureau's Proposed Findings of Fact and Conclusions of Law ¶ 108, wherein the Bureau's employment of the year 1998 is unexplained as the Bureau does not describe which documents circa 1998 on which the Sumpter women's signatures appeared were supposedly used by the Brashers.

signatures and place them on other documents."[16] The Commission can easily determine for itself that the Bureau's statements are fully contradicted by the testimony of Ms. Bolsover and are mere conjecture without the benefit of even a single relevant fact. Nowhere in Ms. Bolsover's testimony does she find any indication that the signatures on the client copies were "lifted." (Tr. 2335-36) Quite the contrary, she found that there were no indications that the signatures were lifted; she could not tell if any of the signatures were put on the client copies by any means other than having been originally written on the pages by the represented party. (Tr. 2350-52) To insinuate that the Brashers lifted signatures received from the Sumpters in 1998 is questionable in its own right. To determine if the signatures were the same as those found on the client copies, or if such could have been used in some way to produce the client copies, the Bureau, itself, requested that Ms. Bolsover review copies of documents signed by the Sumpters during the relevant time period, which documents were earlier sent to the Brashers. Ms. Bolsover testified that there was no basis to conclude that the signatures on these documents were copied *onto* the client copies. (Tr. 2340)

60. The Court's conclusions regarding the client copies demonstrates fully the misapplication of the evidence equal to the Bureau's unsupported conclusions. The Court commences with a conclusion and works backwards to justify that conclusion. At paragraph 145 of the Decision, the Court concludes that the client copies were fabricated by the Brashers. Then, striking a single match to the record evidence the Court notes the issue of the allegedly mechanically reproduced dates on Norma's and Jennifer's client copies. From this the Court concluded that deceptive

[16] Presumably this would have included Jim's signature, but the Bureau is again not bothered by the absence of a client copy showing Jim's signature.

tampering was evident. From that the Court concludes that the tampering extended to the signatures. From that the Court concludes that all three client copies (including Melissa's for which there is not even a scintilla of evidence which might even suggest a problem) were faked. From this the Court concludes that Jim and Norma's remembrance of the trip to Junction was correct. And finally, the court concludes that all testimony regarding the client copies provided by the Brashers was false. Ergo, the Court concluded that since Ms. Bolsover testified that a date had been mechanically reproduced on two of the client copies, that all of the remainder of the Court's conclusions of fact and law are fully supported. This line of reasoning is incredible In sum, it demonstrates that the Decision is based on a single, questionable inference, that the testimony regarding the mechanical reproduction of a date on two of three client copies equals total culpability and justification for disqualification of the Parties.

61. Stated another way, the Court found that because a date might have been mechanically reproduced on two of the three client copies, (i) all testimony given by the Sumpters is entirely credible, (ii) all testimony given by the Brashers is false; and (iii) the Brashers are liable for misrepresentation. What makes this reasoning more incredible is that there is no evidence or opinion or stated fact which demonstrates that the mechanical reproduction of the date is even relevant to the issue at bar, except as one joins the Court in its catapult ride to damning conclusions, skyrocketing over all other record evidence which demonstrates that a contrary conclusion is not only entirely probable, but far, far more likely. Given the fact that the burden of proof remained on the Bureau for this issue, the Court's finding that the burden was satisfied based on nothing more than the condition of the date on two client copies is beyond the pale of reasonableness and evinces clear judicial error

(D). Whether the Court erred in its finding that the Brashers' use of O.C. Brasher's name was a misrepresentation or evinced a lack of candor.

62 For the Court to have found that the use of O.C. Brasher's name was either a misrepresentation or wilful lack of candor, the Court would need to apply the those standards articulated within *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1985)("*Character Qualifications*").[17] From the statements of policy in *Character Qualifications* and related cases, it is clear that the Commission recognizes the element of intent is key to whether a licensee has lacked candor before the Commission or whether a misrepresentation is actionable. "A finding of lack of candor therefore requires a showing that relevant information has been withheld; that the party in question knew the information was relevant, and that it intended to withhold that information." *Algreg Cellular Engineering*, 12 FCC Rcd. 8148, 8175 (1997) *citing*, *In re Application of Fox Television Stations*, 10 FCC Rcd. 8452, 8478 (1995) (hereinafter, "*Fox Television Stations*").

63. In light of the foregoing, it is clear that to establish its case, the Bureau was required to show by a preponderance of the evidence that the defendants (1) withheld relevant information from the Commission or the Enforcement Bureau, (2) knew the information was relevant, and (3) that the information was withheld intentionally, with the specific intent being to deceive the Commission. The Parties contend that the Bureau fell far short of the showing required under *Character Qualifications* and the cases interpreting *Character Qualifications*. To establish that the Parties lacked necessary candor before the Commission or misrepresented facts to the

[17] The policies announced in 1985 in *Character Qualifications* were extended to all licensed services and license proceedings in 1990. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd. 3252 (1990)(made the tenets of *Character Policy I* applicable to all license proceedings, not just broadcast).

Commission, it was not enough for the Bureau to have shown that information ordinarily supplied to the Commission was not provided; the Bureau was required to show that the Parties knew such information was relevant and that it was intentionally withheld. The case the Bureau presented to the Court focused heavily, and nearly exclusively, on an allegation that the Brashers failed to provide relevant information to the Commission, but the Bureau failed to provide any showing that the Brashers were aware that the information they did not provide to the Commission was relevant or that the Brashers withheld such information with the specific intent to deceive the Commission. Absent the Bureau providing a factual basis for these two elements, knowledge and intent to deceive, the Court could not have found that these necessary elements were present and, thus, the Court erred in its Decision.

64. Despite the Bureau's failure to present evidence relevant to the second element of the above three prong test, knowledge, the Decision finds the Parties culpable. That the Decision does not even properly address the issue of knowledge is reversable error. The Court is held to a standard of reasoned decision making arising out of proper application of law and fact. The law states that facts must be shown which support a finding that a defendant had knowledge sufficient to form an intent to deceive based on that knowledge. Yet, rather than rule on the matter based on the record evidence, the Court relies wholly on inference that is not supported by record evidence. Thus, instead of exploring the Brashers' knowledge, the Court found instead that the Brashers had a "strong motivation for their misrepresentation . . .[thus] intent to deceive may be inferred" Decision at 40, ¶151 . Since the motive to which the Court refers is common among all commercial licensees, i.e. to obtain sufficient spectrum to serve customers, then this motive alone cannot create an inference of wrongdoing. Nor can the fact that the Parties faced a

challenge arising under the Commission's Rules. All applicants and licensees face the limitations of the agency's rules. Thus, it was fully incumbent upon the Court to have gone beyond a simplistic assumption that since the Brashers needed spectrum, the Court could properly infer an intent to deceive This leap is too far

65. It is clear from the record that the Brashers lacked any knowledge of the Commission rules that were allegedly violated. The record shows that Ron believed his execution of the O.C. application was fully authorized either by the Durable Power of Attorney or by his status as executor of his father's estate.(Tr. 451, 579-588, Deposition of Ron Brasher) Despite the absence of proof in the record regarding the Brashers' knowledge that certain information might have been needed to be provided to the Commission, the Court found that the Brashers had lacked candor before the Commission. This decision was reached despite the fact that there is more than ample evidence that shows the Parties' actions are inconsistent with an intent to deceive the Commission. That the Court relied entirely on its motive = intent formula to reach an unsupported conclusion is material error. That the Court also failed to even consider an alternative, more likely conclusion is reversable error.

66. It is undisputed that O.C. Brasher was dead at the time Ron Brasher filed an application on O.C.'s behalf, and that the application executed for O.C Brasher replaced an earlier filed, but dismissed application, which O.C. Brasher executed prior to his death.(Tr. 580) As this is undisputed, it is important to determine whether Ron believed he was entitled to file an application on behalf of his late father. If it is established that Ron believed that he was fully authorized and entitled to file an application on behalf of O.C. Brasher or his estate, then it is beyond argument that Ron did not *knowingly* withhold information from the Commission or, of

equal importance, intend to deceive the Commission.

67. The facts and circumstances relating to the second O.C. Brasher application show that Ron Brasher believed he was acting either under a Durable Power of Attorney or on behalf of the estate of his father, O.C. Brasher. (Tr. 451, 579-588) Ron testified that he believed an earlier cancelled application was part of his father's estate and that he did nothing more that re-file that application. (Tr. 580-581). As O.C. was dead at the time of the filing of the second application, Ron's understanding of his authority to file an application in accord with the powers vested in him by the Durable Power of Attorney or as an executor of O.C.'s estate are probative as to a finding of whether Ron intended to mislead the Commission. Despite the fact that the undisputed testimony of Ron shows that he believed he was empowered to file applications on behalf of O.C. Brasher, the Court fails to address what affect this belief has on the inquiry into lack of candor or misrepresentation. As the Bureau failed to rebut Ron's statements that he believed his actions were in accord with the powers vested in him as an executor or under the Durable Power of Attorney executed by his father, O.C., it was incumbent upon the Court to conclude that Ron actually believed his actions were authorized.

68. It is of no importance or relevance whether a sophisticated person or a person with greater knowledge of law or procedure might reasonably believe that Ron's actions are appropriate. The Court must take Ron Brasher as it finds him. It is unreasonable to base the Court's findings on assumptions of Ron's of knowledge which he did not possess. As the record shows, Ron Brasher possessed limited knowledge regarding the law, limited knowledge regarding the effect of the Durable Power of Attorney, and limited knowledge regarding the requirements of the Commission. Accordingly, the Court's finding improperly changes the nature of Ron Brasher by

assuming sophistication and knowledge which is not evident on the record, thus, the Court's ruling is improperly predicated on that unsupported level of knowledge and sophistication.

69. As it is clear from the Commission's rules that an executor, as a person legally qualified to succeed to the interests of the deceased licensee, can hold an FCC license, 47 C.F.R. § 1.948(g), it is problematic that the Decision ignores the impact of Ron's statement that he believed he was empowered to apply for a license on behalf of his father or his father's estate. It is decisionally significant that Ron felt he was authorized to apply for a license in the name of O.C. Brasher. For, since Ron believed that he was vested with the authority to apply for a license on behalf of O.C., then Ron's action cannot be deemed to have evinced a lack of candor or a misrepresentation; and since Ron reasonably believed that as executor he was empowered to act on behalf of O.C.'s estate, his only error was failing to properly identify the applicant as Estate of O.C. Brasher.

70. As shown below at Section II(A), Ron Brasher was actually entitled, under Texas law, to act on behalf of the estate during the four year statutory period in which he was entitled to delay the formal probating of his father's estate, therefore, the only problem with the application that Ron submitted on O.C.'s behalf was that it failed to properly identify the applicant as the estate of O.C. Brasher. This type of error is more akin to inaccurately referencing the type of entity applying for a license (a corporation rather than a limited liability company for instance). While this type of error would need to be corrected in order for the Commission's records to accurately reflect the status of the licensee, such an error represents neither a lack of candor before the Commission nor a misrepresentation, but rather, represents a simple mistake by an unsophisticated applicant.

71. Upon review, the Commission may note that the Decision fails to give ample weight or consideration to the fact that on December 9, 1997 Ron signed his response to the Commission's November 17, 1997 800A letter (RB/PB Ex. 3) in such a manner as to identify the signatory as acting on behalf of O.C.'s estate. (Tr. at 654) While the Court notes that it is entitled to infer intent from motive, (Decision at ¶151) such an inference can only be reasonable if it takes into account evidence to the contrary and assigns appropriate weight to such statements. Despite clear, record evidence to the contrary, the Decision states:

> The record establishes, and it is concluded, that Ron, Patricia, and Metroplex concealed from the Commission for a period of nearly two years - from November 1997 to October 1999 - the fact that O.C. and Bearden were deceased. Further the disclosure of their death came only after Jim Sumpter had reported to the Commission that O.C. and Bearden were dead, and only after the WTB had specifically asked Ron and Patricia to state whether O.C. and Bearden were deceased. In other words, the disclosure came because Ron, Patricia and Metroplex could no longer hide the deaths from the Commission, and under circumstances in which they had no choice to disclose them.

Decision at ¶ 32. The Court found that Ron testified to the fact that his signature on the response to the 800A letter was not intended to constitute notice to the Commission that O.C. had died. (Decision at ¶124 - 130 and fn. 14) This statement is misleading. At trial, Ron was asked "Is it your testimony that by substituting this particular form to the FCC that constituted notice *for all time* to the FCC that [O.C] Brasher was deceased?" Tr. at 654-55 (emphasis added). Undersigned counsel is unable to provide any clear or common sense definition of what "notice for all time" may mean and seriously doubts the Court's ability to assign any plain meaning to the phrase. It is entirely possible that Ron did not understand what that phrase meant, or that he ascribed to it a meaning entirely different from that ascribed to it by the Court in its unsupported interpretation. What is clear is that Court failed to note the not-so-plain language of the question

in its interpretation of the response. A questionable answer to a vague question is not appropriate for the Court's improper use.

72 Contrary to the misleading statement in the Decision and the conclusion drawn therefrom, Ron's signature on the 800A letter is irrefutable evidence that Ron revealed to the Commission in December 1997 that O.C. was dead and that Ron intended to provide notice to the Commission of the status of his father. The transcript shows that Judge Steinberg interrupted the Bureau's questioning to clarify that Ron intended "EST," as entered on the 800A, to mean estate.(Tr. at 655) Remarkably, despite the Court's knowledge that the burden of proof was wholly on the Bureau to demonstrate that Ron's actions evinced a knowing intent to fail to provide candor to the Commission, the Court awarded no weight to the clear actions of Ron Brasher in his obvious intent to indicate on the 800A that he was acting on behalf of the estate when he wrote "O.C. Brasher EST R D. Brasher" within the signature line of that form submitted to the licensing bureau; but gave overwhelming weight to Ron's response to a vague question that lacked any cognizable probative value. Regardless of whether Ron intended the 800A letter to constitute his notice "for all time" to the Commission of his father's death, he clearly intended to, and did, provide an executed document to the Commission that was intended to notify the Commission of O.C's status, dead. Ron's signature on the response to the 800A letter clearly conveyed the fact that he was acting in a representative capacity and removes entirely any plausible inference that he was attempting to deceive the Commission. The Court's finding of a contrary conclusion is at direct odds with the record evidence and must, therefore, be reversed on review.

73. Ron's method of notifying the Commission of O.C.'s demise is consistent with his

unsophisticated, informal methods evidenced in all matters related to this proceeding. However, the Commission may further note that although the Commission's rules require the provision of notice to the Commission of a licensee's death and assignment of the decedent's license. 47 C.F.R. §1.948(g), Ron's actions were not violative of that rule. Ron's consistently delivered testimony, which was fully supported by the record evidence, has been that he applied for the license in a representative capacity. (Tr. 451, 579-88) Ron believed he was empowered to apply for the license either under the Durable Power of Attorney executed by his father or in his capacity as executor of his father's estate. (Tr. 451, 579-88) Thus, Ron believed that the license was the property of the estate of O.C., not O.C. himself. In accord with Ron's sincere belief that the license was issued to the estate of O.C. and not to O.C. himself, and as O.C. was dead before the issuance of the license, Ron was not compelled to notify the Commission of O.C.'s death in accord with a strict reading of Section 1.948(g). Ron's administrative error was his failure to properly indicate that the applicant was the Estate of O.C. Brasher.

74. Thus, to find that the Bureau had met its burden, the Court must find record evidence that supports a finding of concealment and deceit related to the O.C. Brasher license The Bureau did not create such a record upon which the Court might rely. Ron's method of executing the subject 800A does not support such a finding and, in fact, demonstrates that based on a preponderance of the record evidence, the Court should have found that no intended deception could be found. The Court's failure to weigh properly the record evidence is reversable error.

(E). Wether the Court erred in finding that the Brashers' actions related to the Ruth Bearden license warrant disqualification.

75. The Brashers have not contended during any portion of this proceeding that Ron's actions related to the Ruth Bearden application were entirely honorable. As the record shows, the

application was prepared to assist another family member, Ron's uncle.(Tr 173-175) However, the application was signed in the name of Ruth Bearden in accord with Ron's status as the executor of his mother's estate.(Tr. 451 and Deposition of Ron Brasher) And Ron caused the application to be sent to PCIA for required coordination. In having the application prepared and sent to PCIA, the record evidence demonstrates that Ron Brasher's actions were not in accord with the dictates for Commission applicants.

76. Ron Brasher was fully forthcoming at deposition and trial in his description of the way that he employed his late mother's name for the express purpose of having an application prepared and sent to PCIA with an intent that the application create a license for the operation of ten mobile units to be employed by Ed Bearden. (Tr. 173-175) And although Ron Brasher suggested that his authority to so act might also be found to have arisen out of his authority as executor of his mother's estate, (Tr. 451) in fact, Ron Brasher's statements attest to his belief that his efforts in causing the application to be prepared were likely outside the standards of conduct for a Commission licensee. The only conclusion that the Court might reasonably make, therefore, is that Ron Brasher consistently testified that his causing the application to be prepared was wrong, unfortunate, and should not have happened. Such testimony demonstrates remorse, not lack of candor. To the contrary, the testimony shows a willingness of Ron Brasher to offer into evidence the full truth of the matter, even when the truth is not beneficial to him personally

77. Having given a full explanation of the matter, including those portions which do not place his actions in a favorable light, the Court is left with the task of what effect this act should have on determining the fate of the Brashers. In making its determination, it is material that Ron Brasher did not intend to personally benefit from his actions and, in fact, that he took all

reasonable steps to cause the application to not be submitted to the Commission in the first instance. (Tr. 180-185) Ron Brasher informed PCIA that the application coordination process should be fully halted and he believed that PCIA would so act to effectively kill off the application.(Tr. 180-185) PCIA failed to heed Ron Brasher's instructions and the application was submitted and allowed to be processed to grant. However, Ron Brasher's efforts to mitigate the original errant behavior is material to the determination of what effect those actions taken many years ago should have on the Court's decision. It is significant that Ron Brasher never constructed the facility licensed under his late mother's name. (Tr. 116) Since the Brashers consistently constructed all facilities which they licensed in their names or DLB, (Tr. 115-116) the fact that the subject facility was not constructed evidences that Ron Brasher did not intend to abuse the agency's processes beyond the date upon which he instructed PCIA to kill the application. Stated another way, his original actions were intended to be thwarted by his further actions, thereby curing before any harm was visited upon the agency's processes by the original act. Thus, Ron Brasher did not evidence a specific intent to deceive the Commission with the application which he believed had been made void. Any contrary conclusion by the Court is overreaching or in error.

The Period Following The Commencement Of
The Bureau's Investigation

(F). Whether the Court erred in its finding that the Brashers misrepresented facts in its Opposition to the Net Wave Petition.

78. The Bureau claimed, and the Court found, that the Brashers misrepresented facts in the Opposition filed in response to the Net Wave Petition. This conclusion is unsupported by the record and a plain reading of the Opposition which does not assert facts, *per se*, but challenges the procedural basis for the filing of the Net Wave petition. However, the Bureau's assertion

stands on inferences drawn under the least favorable light to the Brashers, excluding that evidence which fully contradicts the conclusion.

79. The Bureau's first inference is drawn from its allegation that the Sumpters did not subscribe to the filing of the Opposition. However, Jim Sumpter testified that, before the Opposition was filed, "[he] read it, but not line by line."(Tr. 1850) Jim did not ask any questions about the Opposition (Tr. 1851) Jim did not care how [Ron] took care of the allegations raised in the Net Wave Petition, as long as [Ron] took care of addressing those allegations, and "if the Opposition would take care of it, [Jim] was just as happy to have [Ron] do it and file it. "(Tr. 1854) Jim just "wanted it done."(Tr. 1854-55) Jim's testimony therefore evidences that Jim authorized and subscribed to the filing of the Opposition in his name and on his behalf. It is outrageous for the Bureau to claim, and the Court to find, otherwise. And given that Jennifer and Melissa have followed Jim's advice on everything he has instructed them on with regard to the Bureau's investigation, it can be logically inferred that they too authorized and subscribed to the filing of the Opposition on their behalf.(Tr. 1966-67) What is most significant is that the Brashers logically and reasonably concluded that their efforts in filing the Opposition were with the consent of the Sumpters and that the Sumpters had knowledge of the content of the Opposition. Thus, the Bureau's claim on this point and the Decision's reliance upon any allegation of misrepresentation arising from the Bureau's claim is in obvious error.

80. It is true that the Opposition states that the Sumpters (as well as the other operators) retained control of their own stations, and further, that all stations are managed by DLB. In the eyes of the Brashers, this was a true and correct statement. The Brashers did not employ the elements of *Intermountain* in making their statement and did not even know of the case's

existence or what relevance it might have on their statement. Rather, the Brashers responded based on their common knowledge and belief. Any other inference drawn by the Court is without any recognition of the manner by which persons normally respond. This stated, the record reflects that the Brashers believed that the Sumpters retained ultimate control in their licensed facilities, and this belief is evidenced by the fact that when Ron was directed by Norma to turn off her station and Melissa's station, Ron did just that.(Tr. 537-538) There can be no better indicia of a licensee's control of a facility then their ability to cause the station to go dark. Accordingly, the Brashers reasonably believed that the Sumpters exercised control over their licensed facilites.

(G). Whether the Court erred in its finding that the Brashers misrepresented facts regarding the Sumpters's applications and licenses during the investigation and hearing on this matter.

81. As demonstrated fully above, the Court's finding that the Sumpter testimony was "forthright, candid, and entirely believable," Decision at ¶148, serves as the basis for the Court's conclusion that the Brashers' testimony contained misrepresentations, *see*, ¶¶ 19-21 above. However, as is fully shown herein, the Sumpters' testimony was not entitled to the court's awarding of complete credibility. It is inconsistent, contradictory, and without any cognizable factual support. In fact, the Decision suggests that the Court's predilection toward believing the Sumpters is based on little more than a photocopy of a single date on a client copy. Having swallowed whole every scrap of testimony given by the Sumpters, regardless of whether the testimony cannot withstand logical scrutiny, the Court backed itself into a position of having to find that the Brashers' testimony was false. Interestingly, the Court's only basis for finding that the Brasher testimony was false is the Sumpter testimony. It had no other cognizable basis for that conclusion. Thus, if the Commission correctly concludes on review that the Sumpter

testimony does not withstand scrutiny in all respects, the Court's conclusion regarding the Brasher's participation in the investigation and hearing is subject to reversal.

82. The Brashers' testimony, as contrasted with the Sumpters, is consistent and supported by documentary evidence which supports their statements. However, of even greater importance, the Bureau could only peek at the threshold of proof that it had the burden to show, standing fully on the shoulders of the Sumpter testimony. If the Sumpters falter, the conclusion of misrepresentation following the commencement of the agency's investigation fails entirely, and the Court's decision must be reversed.

83 Above the Parties have set out dozens of errors, omissions, inconsistencies, and bald assertions made by the Sumpters which cannot be confirmed or logically believed. Said simply, the Sumpters' reflection of the facts simply does not hold water, despite their failed attempts to be fully consistent via their closed meetings to confer again and again regarding the nature and extent of their testimony. Thus, the Bureau has failed to meet its burden of proof to show that the Brashers' participation in the Bureau's investigation or their testimony at trial contained any misrepresentations.

84. That the Court was purely fishing for misrepresentations is shown by what is one of the more bizarre elements of the Decision at ¶ 141. The Court makes much of the expression "initial meeting" and contrasts it with other testimony that suggests that a "series of meetings" took place. This "gotcha" is unworthy of inclusion in the record as the subject testimony was not material and the off-hand expressions or lack of precise erudition of the Brashers is not proof of misrepresentation. Persons remember and express events in differing manners, sometimes providing immaterial miscommunication along with the way. But for a statement to arise to the

level of proof of a misrepresentation, the subject statement has to be shown to false, material, and evincing an intent to deceive the Commission. Even if the recitation of the subject meetings differed to some degree, that difference does not support a finding of misrepresentation. Had the Court spent only some small percentage of its efforts reviewing more closely the testimony of the Sumpters, employing the same litmus test as it applied to the Brashers, it would have noted the long list of the Sumpters' misrepresentations in its Decision, concluding that Sumpters' testimony is so suspect as to fully undermine the Bureau's case against the Parties. That the Court did not apply the same level of scrutiny to all of the testimony is apparent. That the Court did not properly apply equal scrutiny also results in a shifting of the burden of proof from the Bureau to the Brashers, and this is reversable error.

(H). Whether the Court erred in finding that the Brashers engaged in misrepresentation or lack of candor in the investigation and hearing related to the license issued in the name of O.C. Brasher.

85. Ron's response to the Wireless Telecommunications Bureau (WTB) 800A letter, see, Section I(D) above, was not the only time the Ron indicated to the Commission that he was acting in a representative capacity regarding the license of O.C. Ron provided such information to the Wireless Telecommunications Bureau ("WTB") in his response to the WTB's November 9, 1998 letter of inquiry. The Decision fails to reach certain key elements of that response, however. The WTB's inquiry demanded that Ron provide "A list of stations which Ron D. Brasher is managing for these individuals and entities."(EB Ex. 16 at 2) The question did not extend to an inquiry regarding the status of the licensees, i.e. bankrupt, deceased, out of business, etc. and the question was not open-ended, indicating that the WTB sought any information other than that requested. Ron answered the question that was asked.

86. Since Ron believed by his earlier execution and associated information placed on the 800A

that he had previously notified the WTB of his father's condition, (RB/PB Ex. 3) his response cannot be found to have been intended to conceal a fact which he believed he had already fully revealed to the Commission. Thus, the Parties aver that the reply to the November 9th letter was fully responsive and provided all information that was sought. That the Brashers did not provide more information than that which was requested cannot be found to be improper. The Court's finding to the contrary is, therefore, unsupported by the record evidence and is in clear error

87. That the Court erred is further illustrated by the fact that the Decision misquotes Ron's response to the November 9th inquiry. The Court states the following regarding Ron's December 7, 1998 response: "Nowhere in his letter did Ron disclose the fact that O.C. Brasher and Bearden were dead (*id.*), although the response listed O.C. as a "Licensee" of one of the 'Managed Stations' (*id.* at 3). (Decision at 20, ¶ 75) This statement materially misquotes Ron's December 7, 1998 response. Ron's response to the December 7 inquiry listed the licensee as "O.C. Brasher/Ron D. Brasher" and does not list the Ruth Bearden license as a managed facility. As is clear from the response, Ron indicated that he was functioning in a representative capacity in relation to O.C.'s license. That Ron did not use the words 'executor' or 'estate' in his response does not provide evidence of an intent to conceal whether O.C. was alive, particularly in view of the earlier disclosure on the 800A. To the contrary, had Ron wished to conceal O.C.'s death, he would not have listed his name with O.C.'s as the licensee Accordingly, the Court's misquoting of the true manner of Ron's response to the subject inquiry letter demonstrates that the Court was improperly applying the record evidence

88. Ron Brasher was, thus, not on reasonable notice that the WTB was unaware of O.C.'s death. He had informed the WTB in the 800A and his response in December, 1998 was fully

consistent with his earlier effort to notify the WTB. Only after the WTB sent its September 9, 1999 inquiry did Ron Brasher recognize that the WTB might not know that O.C. was deceased. Certainly there was no indication that the WTB did not understand O.C.'s status and the WTB did not made specific inquiry until September, 1999. Upon the WTB's inquiry of 9/99, Ron provided a truthful answer to the issue. The Court's finding that the WTB did not discover that O.C. was dead until Jim Sumpter informed them of O.C.'s status (Decision at 32, ¶119) is, thus, based on a convolution of the facts that is fully contradicted by the record evidence. If so, the WTB simply did not read its own licensing records and did not ask Ron a simple question regarding the plain language on the 800A. A person cannot be found to have lacked candor when the person reasonably believed and the record demonstrates that the material information which is alleged to have not been provided, was not asked for and was already presented to the inquiring Bureau. Accordingly, the Commission must find on review that the Court's finding related to the Parties' candor in informing the WTB of O.C.'s death is contrary to the record and must be reversed.

(I). Whether the Court erred in finding that the Brashers lacked candor in their participation with the Bureau's investigation and the hearing.

89. To avoid unnecessary repetition herein, the Brashers aver that when the Court found that the Parties lacked candor, as a result of the Court's finding of misrepresentation by the Brashers, those findings must each fail for those reasons expressed above. Since there exists no record evidence which supports any finding that the Parties engaged in misrepresentation in their participation in the Commisson's investigation and at hearing, the remaining element candor, requires separate treatment. Although the Court found that the Brashers engaged in misrepresentations based on the Court's acceptance as believable the totality of the Sumpters'

testimony, the Commission will find on review that the Court's finding of lack of candor is usually a simple an add-on to misrepresentation, and that the Court rarely treats the issues separately. When such is done, those findings are met throughout this submission.

90. At all times relevant, the Parties have been more than forthcoming in responding to Commission inquiries. When asked, the Brashers answered fully and completely, putting forth costly and painstaking efforts to provide thousands of documents for the Commission's review. The Brashers masked nothing. The Brashers, after discovering that they were indeed in violation of certain rules and regulations, did nothing to thwart the Bureau's investigation. The Brashers fully admitted in their responses that DLB was operating the subject stations in a trunked manner that apparently violated the Commission's rules–this trunked operation being one of the primary issues presented in the Net Wave Petition and subsequent Bureau inquiry. (EB Ex 7, pg. 7) Nor did the Brashers hide the fact the some of the subject stations were being managed without a written agreement, although such activity is also held in strict disfavor by the Bureau.(EB Ex. 17, pg. 2) Therefore, the Brashers' admissions serve as evidence of candor, not lack of candor.

91. That the Parties did not lack candor is fully demonstrated by the record. Nearly all evidence employed by the Bureau in its case, excepting Bureau Ex. 50, was supplied to the Bureau by the Parties. On one hand the Bureau relied nearly exclusively on the documents and responses provided by the Brashers, including those documents and responses which revealed violations of the Commission's Rules. Yet, the Bureau contended and the Court found that those same documents revealed a lack of cooperation and candor in the Bureau's investigation. The Parties are at a loss in explaining how a defendant can give the Bureau its alleged case via thousands of pages of documentary evidence and associated admissions, and still be found to be

uncooperative and lacking candor.

92. Finally, the Court's finding of lack of candor at the hearing is fully belied by the record. Lack of candor is grounded in a party's withholding of material facts or failing to respond to direct inquiry. The Parties respectfully direct the Commission to the record testimony of Ron Brasher upon which the Court relies in making its ruling. During days of testimony, Ron Brasher was asked approximately 2,637 questions. To those questions he answered "I don't know" to 56; "I don't remember" to 12; and "I don't recall" to 2. Therefore, he failed to answer or provide substantive testimony to only 2.7% of the questions asked. This remarkable effort does not support a finding that Ron Brasher was attempting to hide anything. To the contrary, Ron Brasher's testimony demonstrates fully that he was attempting to hide nothing, trying his best to answer every single question asked, in full.

II. Real Party-in-Interest/Unauthorized Transfer of Control/Abuse of Process: Issues (b) and (c). Whether the Court erred in finding that the Brashers had abused the Commission's Processes via violations of the real party-in-interest standards and rules against unauthorized transfers of control which support disqualification.

93. As a first matter within this generally expressed issue by the Court, the Brashers aver that the Court decided in clear error when it found at paragraph 154 of the Decision, "unauthorized transfer of control, real party-in-interest, and abuse of process are inextricably intertwined [and] they will be considered together." The Court's statement provides to it a convenient short-cut in its efforts to decide the complex matters before it, but its ruling is fully in error. An entity may negligently cause a transfer of control to occur by failing to file the proper application with the Commission when equitable ownership of the license shifts to a new party via sale of shares of stock. Upon death or settlement of an estate or bankruptcy, the real party-in-interest can change overnight, prior to any notification or request for assignment or transfer of a license. Either

transfer of control or a change in real party-in-interest can occur without specific intent to abuse the Commission's processes or deceive the agency for any purpose. It is notable that the Court provides no case law in support of its sweeping statement. In fact, none can be found.

94. How much the Court's stated belief, that these three issues are interdependent or may be found to exist as a grouping of issues for the Court's convenience, has adversely affected the Court's ruling is obvious. For if the Court had focused solely on the issue of abuse of process, applying the relevant law in this area, it could not have found that the Parties abused the Commission's processes, *see*, Section II (A) below. And if the Court had properly dealt with this single issue, rather than bunching it together with the others, would the Court have found that the Brashers should be subject to disqualification? The Commission is left to wonder and, therefore, upon review the Commission should find that the Court erred in the first instance in its treatment of these issues and reverse the Decision.

(A). Whether the Court erred in finding that the Brashers had engaged in abuse of the Commission's processes.

95 For the Court to have found properly that the Parties had abused the Commission's processes, the Court would need to reasonably conclude that the Parties had used a Commission process to achieve a result that the process was not intended to produce or use of that process to subvert the purpose that the process was intended to achieve.[18] Like a claim of misrepresentation, a finding of abuse of process hinges on the intentions of the defendant, [19] i.e

[18] *Broadcast Renewal Applicants*, 3 FCC Rcd. 5179, 5199 n. 2 (1988).

[19] A conclusion that an entity abused the Commission's processes requires a "specific finding, supported by the record, of abusive intent". *Evansville Skywave, Inc.*, 7 FCC Rcd. 1699, 1702 n. 10 (1992); *see, also, Eunice Wilder*, 4 FCC Rcd. 5310, ¶ 251 (1989) with regard to required disclosures in the application process, only intentional non-disclosures will support a finding of abuse of process.

the court must find that the Bureau demonstrated that the Brashers had a specific intent to abuse the Commission's processes.

96. Additionally, the focus is on whether a defendant abused the Commission's processes to achieve a result to which the defendant would not otherwise be entitled. No abuse of process was found where it was also found that the Bureau presented no evidence or other showing that the licensee was ineligible to hold the license in question. *In the Matter of James A. Kay, Jr* , WT Docket No. 94-147, FCC 99D-04, 10 FCC Rcd. 2061, ¶ 205 (released Sept. 10, 1999) (hereinafter, "*James A. Kay, Jr* "). Accordingly, if the Parties were otherwise eligible to hold the subject licenses, then abuse of the Commission's processes cannot simultaneously be found to have occurred.

97. It is unquestioned that the Brashers acted without legal counsel in the preparation and filing of the subject applications. It is further unrebutted that the Brashers were seeking a lawful means to obtain additional channels in view then-newly revealed licensing challenges presented by Section 90.313(c).[20] It is also shown upon the record that the Brashers relied on advice given by Scott Fennel of PCIA and John Black in the preparation of the subject applications, and that the Brashers did not devise their licensing method independent of this advice. It is further uncontested that the Brashers looked at the licensing techniques employed by other licensees in

[20] The testimony given at trial reveals that some interpretation of the Commission's rules, which interpretation has not been offered by the Bureau or any of the witnesses, precluded the Brashers from immediately duplicating that licensing method which resulted in a five-channel grant for station WIL990 on 5/28/96. The only explanation provided at trial relates to 47 C.F.R. §90.313 and the supposed obligations on applicants arising out of an unpublished interpretation of that rule that was made effective by the internal policies of PCIA in mid-1996. (Tr. 2259-65) Further testimony demonstrated that both John Black and PCIA's representative, Scott Fennell, assisted in trying to explain that interpretation to Ron Brasher, further suggesting the possible method for complying with that rule section via the use of managed facilities. (Tr. 585-89, 1643)

the Dallas area and concluded that the advice given by Fennel and Black was evident in the licensing of other carriers' systems.(Tr. 587-88, 649-50) Therefore, on review the Commission should look closely at this record evidence which demonstrates fully that the Brashers did not evince an abusive intent in their preparation of the subject applications.[21] Rather, the Brashers were following the advice of a trusted advisor in John Black and a quasi-governmental person in Mr. Fennel, whom the Brashers reasonably believed were advising them in obtaining the channels *without* violation of the Commission's Rules.(Tr. 587-88, 649-50) No other conclusion is possible and the court erred in its contrary finding.

98. The Court also did not consider the fact that DLB was fully entitled to hold the subject licenses in its own name. Although the method chosen by the Brashers pursuant to Black's and Fennel's advice was absurd given the availability of easier, more straightforward methods of licensing, the fact remains that DLB was fully eligible to hold each of the subject licenses in its own name, thus abuse cannot be found to have occurred.

99. The subject rule with which the Brashers, Black and Fennel struggled is 47 C.F.R. § 90.313, which reads in relevant part:

> §90.313 Frequency loading criteria
> (a) Except as provided for in paragraph (b) of this section, the maximum channel loading on frequencies in the 470-512 MHz band is as follows:
> (2) 90 units for systems eligible in the Industrial/Business Pool (see §90.35(a))
> (c) ...A licensee will be required to show that an assigned frequency pair is at full capacity before it may be assigned a second or additional frequency pair. Channel capacity may be reached either by the requirements of a single licensee or by several users sharing a channel.

Taken together, the subsections of Section 90.313 require that a licensee show that a channel is

[21] Again, the Commission may take into account the obvious commonality

fully loaded prior to requesting additional channels. In essence, the rule is intended to prevent spectrum warehousing. The rule is designed to assure that an applicant only applies for the number of channels required to meet the needs of demand. Yet, despite the obvious intention of the rule, to assure that spectrum is used to serve the public and not be hoarded while lying fallow, it is curious to note that this intention was not thwarted by or even alleged to have been violated in any manner by the Parties. To the contrary, the premise of the Court's finding is that the Parties abused the Commission's processes by a means which resulted in a condition that the rule was specifically attempting to achieve. All of the subject channels were constructed, fully loaded, and provided service.[22] Therefore, the clear intention of the rule was fully served by the Parties, and the only issue which remains is the means by which the Parties fulfilled the intent of the codified rule.

100. The means suggested by either Fennel or Black were silly, and better served Mr. Fennel's interest in obtaining additional coordination fees and Black's interest in application preparation fees, than they served the Brashers or DLB. If provided advice from competent telecommunications counsel rather than these informal advisors, DLB could have employed one of at least two other paths for licensing the channels in DLB's name. Either DLB could have requested a waiver of Section 90.313, to which DLB would have been fully entitled given the circumstances. Or DLB could have filed successive applications, one following the other, until all of the necessary channels were granted based on the immediate loading of the 700 mobile

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[22] In fact, the channels immediately provided service to over 700 mobile units (Tr. 79), a loading level sufficient to justify a number of channels equal to all of the channels licensed to the Sumpters, O.C. Brasher, Ms. Lutz, et al. That this loading was immediately achieved is part of the Court's finding and the record.

units. More specfically,

> DLB would have constructed all seven channels, and programmed all of the mobile units to operate on each of the channels. The repeaters would not be activated, i.e. placed in service, until grant. If the seven applications arrived in order at the Commission, each successive application would be fully supported by the grant and activation, with full loading, of the prior granted application. Thus, grant-activation-loading, grant-activation-loading, etc. would have occurred lawfully over a seven business day period. Admittedly, this method, albeit entirely consistent with the rule, is somewhat cumbersome and silly, it still demonstrates that DLB was fully eligible to hold all of the subject licenses in its own name, while simultaneously comporting with the full intent of the subject rule.

Despite whether DLB chose to request a waiver of the rule, to which it was entirely eligible, or file seven successive applications, for which the record shows that grant would have been wholly appropriate, the conclusion which the Commission must find upon review is that DLB and/or the Brashers were fully eligible to hold the subject licenses and, thus, no abuse of the Commission's processes might be found.

101. This conclusion is consistent with the case law which clearly states that abuse of the Commission's processes will not hold when the actions taken by party do not violate the intent of the Commission's rules and which result in the grant of a benefit for which the entity would have otherwise been fully eligible. The clear intent of the subject rule is to prevent spectrum warehousing and to assure that the T-band channels are constructed, made operational, and are fully used to provide communications service to the public. The testimony and associated evidence is entirely clear that the subject channels were acquired to serve the public, were used to serve the public, and have been employed at loading levels which are fully consistent with the criteria set forth in Section 90.313. (Tr. 79, 553-55) The Bureau does not allege that the Parties

engaged in spectrum warehousing or otherwise obtained the channels for any nefarious reasons which are inconsistent with the intent of the Commission in the creation of the rule. That claim is conspicuously missing in the Decision. What the testimony and evidence fully show is that the Parties employed the channels in the exact manner contemplated by the Commission. Accordingly, Commission should find as a matter of law that the Parties did not intend to nor engaged in abuse of the Commission's processes.

102. Similarly, the Commission must find, upon review, that Ron Brasher was entitled to file an application on behalf of O.C. Brasher. Although the Decision fails to recognize that an executor of an estate is entitled to hold a Commission license, the Commission will have no difficulty confirming this eligibility, including the eligibility of: "an individual, partnership, association, joint stock company, trust or corporation " 47 U.S.C.§ 3(32) and 47 C.F.R. § 90.7 If there exists no bar to an estate holding a license, represented by the authority of the executor to sign necessary documents, there is similarly no bar to an executor applying for a license. The Court erred in its decision by failing to even explore this element in its finding of abuse. For if, as the record shows, Ron Brasher believed that O.C.'s estate was eligible to apply for and hold a license, then the application executed by Ron on behalf of O.C. cannot be found, standing alone, to evince any intent to abuse the Commission's processes.

103. Although Ron Brasher may not have been aware of the Commission's rules in his efforts, if he had fully explored same he would have discovered that the Commission does indeed recognize the powers of an executor and state that an affected license shall be deemed involuntarily assigned to "such person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved." 47 C.F.R. §

1.948(g). The quoted rule makes it clear that the Commission's rules permit executors to hold licenses, and in the absence of any statement to the contrary, it is equally clear that an executor is entitled to file applications on behalf of an estate. Therefore, an executor of an estate is entitled to apply for a license in his representative capacity so long as the executor is legally qualified to succeed to the decedent's interests under the laws of the state having jurisdiction over an estate. In the case at bar, Ron was entitled to apply for a license on behalf of his father's estate so long as he is deemed to be qualified to succeed to O.C.'s interests under Texas law. The burden of proof remained on the Bureau to demonstrate that Ron did not possess this qualification and, to meet the burden of specific intent to abuse the Commission's processes, that Ron knew that he possessed no such qualification, and that he sought to deceive the Commission regarding his qualifications. The Bureau introduced no evidence on this matter and the only record evidence upon which the Court could rely is the testimony of Ron Brasher which stated that he believed he was entitled to act on behalf of his father's estate, in the name of his father.

104. Had the Bureau or the Court properly probed the Texas probate statutes it would have been shown that a decedent's estate can be probated up to four years after the decedent's death. *See Tex Probate Code Ann § 74 (West 2001)* In accord with Texas law, "all applications for administration upon an estate must be filed within *four* years after the death of the testator or intestate." *Id* (emphasis added). As it is clearly contemplated under Texas law that the administration of an estate need not be instituted immediately upon expiration of the decedent, or even within a few years thereafter, it logically follows that a party managing the affairs of the decedent in the interim period between the decedent's death and the institution of the administration of the estate is acting as a *de facto* executor until such time as an application for

administration of the estate is formally filed. Insofar as Texas law permits up to four years to file for administration of an estate, the fact that Ron acted on behalf of his father's estate prior to filing for administration of the estate does not support the conclusion that Ron was not entitled to take such action on behalf of his father's estate, particularly in view of the fact that Ron was relying on the language of his father's will, naming him executor.

105. It is not contended herein that the application, if properly filed, need not have indicated that Ron Brasher was filing the application in his capacity as executor of his father's estate. It is simply contended that the Bureau failed to address, and the Court failed to consider, the issue of whether Ron's entry of O.C.'s name on the application was a simple error regarding how to title the license for the estate, or was an attempt to mislead the Commission. As shown above, Ron's use of his father's estate was not and cannot be shown to be a misrepresentation, thus no necessary finding of intent to deceive the Commission is possible. The fact remains that Ron's belief as to his ability to file an application in the name of his father's estate was reasonable under the specific circumstances of this matter.

106. As shown above, abuse of process cannot be found under the particular circumstances of this matter and application of relevant case law and rule. Thus, insofar as the Court has improperly attempted to consider together the issues of abuse of process/real party-in-interest/transfer of control, the Commission should, on review, separate these issues in its consideration and reverse the Court's "bootstrapping" of arguments. Indeed, a violation of the real party-in-interest rules, if found, is not equal to abuse of process; nor does a finding of unauthorized transfer of control allow for an automatic finding of abuse of process, as is clearly shown above.

(B). Whether the Court erred in finding that an unauthorized transfer of control or violation of the real party-in-interest rules had occurred which support disqualification.

107. Commission precedent states that this issue is one that will be determined on a case-by-case basis,[23] noting that the unique nature of business and, as here, familial relationships can often blur the lines between licensee, operator, manager, and employee. The need to examine carefully each situation is particularly valid when the subject stations are operated by some combination between licensee and the party to whom control is deemed transferred.[24]

108. Both the Bureau in its HDO and the Court rely on an old case, *Intermountain*,[25] in which the decision set forth indicia of control of a common carrier station. However, the Court's reliance upon this old case may be misplaced and nothing within the Decision reflects the Commission's efforts to create secondary markets of spectrum, whereby the old idea of strict licensee control of all aspects of operation have been modified and are subject to further modification. Stated simply, the regulatory thrust of the Commission has changed since 1963 when *Intermountain* was published.

109. *Intermountain* preceded disaggregation and partitioning and management contracts accepted as a lawful means to share the fruits of licensing among a broader range of businesses.

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[23] Whether transfer of control has occurred is a matter of interpretation of unique facts regarding a specific license, not a codified formula. Ergo, those facts are relevant to individual cases and the facts presented therein; *Fox Television Stations,* at ¶154 "[d]etermining de facto control is more complex for it involves an issue of fact which must be resolved by the special circumstances presented. Case by case rulings are therefore required."

[24] Stations are often financed, serviced, supplied and operated by contractors, managers, cooperative associations, joint venturers, manufacturers and service companies, on behalf of licensees.

[25] *Applications of Microwave Transfers to Teleprompter Approved with Warning*, 12 F.C.C. 2d 559 (1963), (Public Notice), (*i e* Intermountain Microwave Standard).

There is no way that one could reconcile the language of *Intermountain* with the creation of 700 Guardband Managers. The obvious conclusion is, therefore, that the law has moved and evolved beyond the suggested strict application of the tests put forth in *Intermountain*, and the Court should have looked to the regulatory agenda of the present Commission and its decisions, rather than applying a test devised forty years ago.

110. The above considered, *Intermountain* itself held that the six indicia of control suggested therein were only instructive for the purpose of determining control of a licensed facility. Therefore, if one meets only four of the stated tests, or five, or only one, does that mean that one has failed to demonstrate adequate maintenance of control for the purpose of deciding this issue? *Intermountain* does not suggest this outcome. The case is, at best, illustrative, not draconian in its meaning and intent.

111. Nor could the Court presume that a *pro se* actor had reviewed the contents of *Intermountain* prior to acting, or studied the case law arising out of the Commission's application of 47 U.S.C. § 310(d) Had the Parties sought legal counsel earlier in the process, this matter would not be before the Commission and the hearing would not have taken place in the first instance, for DLB would have held authority for each of the subject channels in Allen, Texas, employing rather simple licensing processes of the Commission.

112. Finally, as a preliminary consideration to the issue of control, the Commission may note that *Intermountain* did not attempt to deal with the situation where the relevant parties are family members. This area of the law is filled with unique circumstances, specialized treatment, and differing conclusions than might be decided if the relevant parties were unrelated entities. Therefore, the Court's failure to consider the status of the parties and their close family

relationship is reversal error It was incumbent upon the Court to apply the law in a manner which takes into account all material, relevant circumstances. Yet, the Court did not and, thus, its Decision is in error.

113. Taking into consideration all relevant factors, the Commission, upon review, will find that the uncontested record evidence shows that the Brashers were ignorant of many areas of the law related to third party licensees. Accordingly, the Brashers employed a licensing method which was silly. They also employed a method, which predates *Intermountain*, for choosing those persons who would stand as licensees, and upon whom they might rely for future, expected harmonious, business dealings. They chose family members. This choice is not unusual, unexpected, and given other circumstances, might be considered quite noble.

114. The family members chosen had knowledge of DLB's business and contributed, in various fashions, to the success of the overall enterprise. Jim Sumpter obviously had intimate knowledge of DLB's business and, in fact, created the accounting method that guided Pat in commencing and continuing the operations.(Tr. 1870-71) Norma went shopping with Pat each Saturday and they discussed DLB's business with great regularity.(Tr. 1073) Norma also participated in the accounting function in her role as Jim's assistant, including writing checks for FCC filing fees on Jim's business account.(Tr. 376, 1990, 2118, EB. Ex. 42 at 2) O.C. Brasher lived with Ron and Pat and was also fully aware of the efforts of the business. (Tr. 804) Jennifer was studying to become a CPA and worked on DLB's accounts in Jim's office – again gaining knowledge of DLB's operation.(EB. Ex 19, Tr. 810-11) And Melissa was, like the others, around for those discussions about what DLB was doing and where it might go. (Tr. 344, 396) Carolyn Lutz actually worked for DLB and assisted in the preparation of the applications to the

FCC.(Tr. 777, 832, 1132, 1150, 1230) The record evidence shows that among the aforementioned parties, Jim, Norma, Melissa, and Jennifer all claim to have executed applications for FCC licenses, and Jim and Norma both held licenses prior to 1996. (Tr 390, 347-8, 540, 1119, 1315, 2124, EB Ex. 42 at 2)

115. The family members not only possessed various degrees of knowledge regarding DLB's business, but each of the family members also possessed knowledge regarding the potential value of spectrum, i.e. licenses. An earlier sale of 800 MHz channels by DLB had amply demonstrated to each of the family members that the status of being a Commission licensee could, under the right circumstances, be quite beneficial.(Tr. 1891, 2200, 567, 399) The uncontroverted facts of the matter demonstrate that family trusted family to contribute to the overall benefit of the family in expanding DLB's business. Like shares of stock distributed among family members, the Brashers sought to distribute licenses among family members who understood to some degree the nature of the business and FCC licensing and whom they believed they could trust in future dealings

116. Although the Court's ruling attempts to make much of the financial aspects of the licensing and operation of the subject stations, *see*, Decision at ¶¶162-165, and indeed the analysis would have some credence if applied to normal business entities, the Parties' financing of operations is neither unusual, nor unexpected, in a family setting. It is apparent that all participants knew that the channels were intended to promote the family business, DLB. It is also apparent that all family members intended to benefit from this promotion. In essence, what was good for the family business would reap benefits for all of the participants in licensing. By contributing each's licensing assistance, Carolyn Lutz's financial prospects would be improved

through her employment with DLB, Jim and Norma Sumpter would obtain greater financial rewards through greater demand for accounting services, O.C. Brasher's benefit via his original application would be a direct result of any improved financial condition in Ron and Pat, since he lived in their home. As Jim and Norma prospered, so too would their children, Jennifer and Melissa. Under the circumstances, the intended benefits of increasing DLB's revenues would have a positive effect that would be felt by all participants. The intrafamily effects of the new channels and the revenues which might be derived motivated all of the participants.

117. That the Brashers or DLB paid for licensing or repeaters or rents is deemed significant by the Court for demonstrating some form of improper intent. However, only the Brashers among the family members could afford these costs. That they paid these costs, either directly or via DLB, is then not evidence of improper activity, but rather a natural outcome of the family and the members' respective resources. If the family had, instead, fully incorporated all of its members via a distribution of stock, the source of the funds of operation would still have been DLB or the Brashers. The Brashers would still have been the source of investment capital. Under that scenario, the Commission would have no interest in this matter. However, since an unsophisticated group of family members chose a different method for accomplishing equal goals, the Court would subscribe an improper intent. This is illustrative of the fact that application of *Intermountain* is completely forced and problematic when applied to family situations. As the testimony shows, DLB did not even have named members to a board of directors.(Tr. 619-20) The family didn't know that it was necessary or required. (Tr. 619-20)

118. The Brashers have averred that during all times relevant *de facto* control of the subject licenses was held by the family and that such control never transferred, until such time as this

matter fractured involuntarily the family unit No other logical interpretation exists based on the totality of the evidence. This obvious conclusion is only rebutted by the forced application of *Intermountain*, which application is improper given the facts and circumstances of this matter. That the family exercised *de facto* control and that no one member or shareholder in DLB exercised all of that control suggested by *Intermountain*, is clearly held forth in the record. DLB ran the facilities and billed the customers, yet the Brashers financed the purchase of the repeater equipment and paid the site rental. Jim Sumpter made all decisions regarding the finances of the business, including the payment of taxes and treatment of employee benefits. In fact, DLB was Jim Sumpter's biggest customer for years, providing the bulk of his income. Norma assisted Jim and Jennifer also worked on the accounts. (EB Ex 19) Carolyn Lutz was an employee of DLB and volunteered to assist in the licensing of additional channels.[26] (Tr. 777, 1132, 1158) Together, the various family members fell naturally into their roles, based on their efforts, education, experience and knowledge, that forwarded the overall enterprise.

119. The shared enterprise worked well and harmoniously for all related persons, until the Net Wave petition hit. As described above at ¶ 24, the arrival of the Net Wave petition created fear in the Sumpters. Formerly close family members became concerned about their livelihoods, professional standing, and even wondered if they might be subject to criminal prosecution and jail.(Tr. 969, 1099, 1101, 1103, 1366-68, 2201) Instead of the cooperation that each had enjoyed with each other, suddenly persons struck defensive postures, even if that meant the Sumpters had to join together to concoct a story that would result in the Brashers being pilloried before the agency What was a close family unit became chaotic, fearful, recriminating, and

[26] Three other family members also served, at various times, as employees of DLB.

panicked, resulting in personal betrayals and false accusations to fortify the bunkers of the various camps against Commission scrutiny. Nothing is clearer on the record than the reactions to the Net Wave petitions and the adverse effect that it had on the family unit.

120. Yet, even before the Net Wave petition arrived, it is apparent that the Brashers did not exercise the absolute control over the facilities that the Court found. Most telling is the fact that Norma had previously requested that the T-band facility licensed in her name and the T-band facility licensed in Melissa's name, be shut off. (Tr. 537-38) The record shows that this demand was satisfied by the Brashers.[27] By this material action, the Brashers demonstrated in the clearest manner possible that the Sumpters exercised ultimate control in their licenses and associated facilities. *Intermountain* does not reach this kind of control. That case assumes operational facilities and that the controlling entity would allow for continued operations. Elements of unfettered control, access, policy decisions, etc., pale in comparison to the most important indicia of control – the ability to shut off the facility and cause it to remain dark with only a phone call. If, as the Court errantly concluded, the Brashers were managing the stations for no one but themselves, *see*, Decision at ¶166, why would have the Brashers acquiesced to Norma's request. In fact, they would not. That the Court did not discuss this material, telling fact in its analysis of control within paragraphs 153-167 of its Decision, is reflective of the Court's improperly selective use of the record.

121. Further, in its improper marrying of the unproven allegations of misrepresentation and abuse of process, the Court moves itself unilaterally toward the, then inevitable, conclusion that

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[27] Although Melissa stated that she did not make such a request, the record evidence shows no rebuttal from Norma regarding this request and, thus, it stands uncontroverted.

an unauthorized transfer of control or real party-in-interest problem existed which arose out of an undefined and unsupported contention that the Brashers had engaged in deceptive practices. No where within the Court's analysis of the issue of control did the Court consider that all subject applications and licenses demonstrated commonality of control on their face. This true and uncontroverted fact flies squarely in the face of the Court's repeated conclusion of deception at every turn. What this obvious and continuously reported commonality demonstrates clearly is that despite the questionable method of licensing employed by the Parties, there can be no finding that an intent to deceive the Commission was present. For one cannot hide from the licensing Bureau what one places in plain view.

122. The Parties respectfully request that, upon review, the Commission look to the specific facts and circumstances of this matter and apply an appropriate view of the Commission's treatment of family matters to the Parties' licensing, taking into account the unsophisticated nature of the Brashers. Upon review, the Commission will find that the illustrative elements of *Intermountain* simply do not work in defining the control of the subject licenses. The Commission will further find that for all of the administrative errors and misunderstandings of the Brashers during the time when they were acting *pro se*, based on advice from third parties and their pedestrian methods of confirmation by examining the licensing of other radio systems, the Brashers never evidenced an improper motive in their actions, i.e. an intent to deceive the Commission. Absent any showing of this specific intent, of which there is none except via factually unsupported inferences which are belied by the record, the Court could not have properly concluded that the Brashers should be subject to disqualification.

III Whether the Court erred in its disqualification of the Brashers and DLB

123. The record does not support the result of the Court's ruling. Based on a "he said, she said" case, in which the Court wrongly awarded full and undeserved credulity to the Sumpters and, thus, damned the Brashers on every point, issue, element of fact, document, application, license, and recollection, the Court builds for itself a justification for disqualification which is not supported by the record evidence. As shown herein, the record evidence does not support misrepresentation absent the Court's unsupported leaps of logic. Certainly, no reading of the record could support a finding that the Bureau even came close to carrying its burden of proof. Even the testimony of the Bureau's expert witness, when found inconvenient regarding the genuineness of the Sumpter signatures on the client copies was tossed overboard due to an irrelevant finding that the dates on two of the client copies were mechanically reproduced.

124. Given an unbiased reading, the record does not support a finding of misrepresentation, lack of candor, or abuse of process; the three potential bases for disqualification. Rather, the record demonstrates fully that an unsophisticated person, Ron Brasher, believed that his actions were lawful and did nothing to conceal the methods he chose to obtain additional channels for DLB. Each of the applications clearly showed commonality. He executed the 800A for the O C. Brasher Estate license by indicating that the license was to be held in the estate. The Parties responded fully and honestly to each of the WTB's inquiries, provided thousands of copies of documents pursuant to discovery, participated openly in the discovery process, and answered with great effort an enormous amount of questions at hearing, even when the answers were known to be unhelpful to their case.

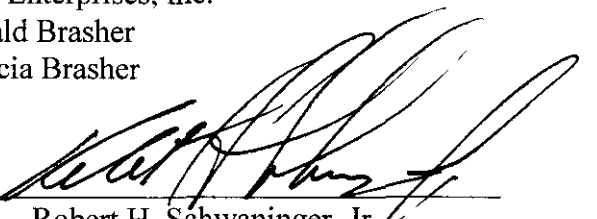
125 The Parties do not contend that their actions were entirely appropriate or that the manner by which they chose to license facilities was in strict accord with the agency's rules and policies. Errors of administrative nature, assumptions regarding acceptable licensing methods, failure to reduce to writing management agreements, etc. thread throughout the history of this matter. However, despite the errors and omissions of their actions, the Parties respectfully request that the Commission look carefully at the record evidence and compare it with the findings within the Decision. The Parties are confident that the Commission will not find that the uncontroverted facts and application of relevant law present in this matter justify the complete economic ruin of two persons in their seventies, probably causing them to lose everything except their home. Decision at ¶109.

126. If a negotiated settlement is found to be advisable, the Parties have always stated their willingness to discuss such an outcome, even if it means that Ron and Pat must exit forever the business. However, to ruin DLB and to effectively shut off its system, would place persons out of work, would create economic waste in the end users and customers, and would create ancillary harm in the millions of dollars. The Bureau's case and the uncontested facts of this matter do not justify this extreme outcome.

Conclusion

127. For the reasons shown herein and for good cause shown, the Parties respectfully request that the Court's Decision be reversed on review or modified to allow the Parties to pay a forfeiture commensurate with factually supported findings of fact and conclusions of law.

Respectfully submitted,
DLB Enterprises, Inc.
Ronald Brasher
Patricia Brasher

By 
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Benjamin J. Aron
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Dated: September 8, 2003

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing Exceptions was served by hand delivery/courier to the below listed parties on this 8th day September, 2003.

Hon. Arthur I Steinberg
Administrative Law Judge
Federal Communications Commission
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Washington, DC 20554

Ms. Judy Lancaster, Esq.
Mr. William Knowles-Kellett, Esq.
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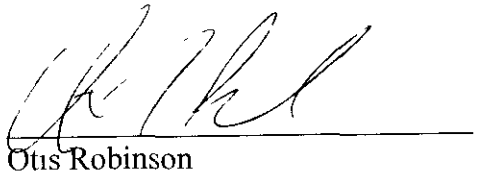

Otis Robinson